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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 80

EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

RUSSELL E. PARSONS and
HARRY E. WEISS
For Petitioner Canard
RUSSELL E. PARSONS
For Petitioners Stafford, Myers and Miller
ARTHUR LEWIS, Of Counsel
For Petitioners Myers and Miller
205 South Broadway
Los Angeles, California 90012
Telephone: 626-9167

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1967

No.

EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Emmett Canard, Cyril Myers, Peter Stafford and George Miller, defendants and petitioners, pray for a writ of certiorari to the Court of Appeal, Second Appellate District, State of California, to review its judgment affirming judgments of the Superior Court of the State of California, in and for the County of Los Angeles, sentencing the petitioners as hereinafter set forth.

The defendants were found guilty as follows:

Peter Stafford – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 145).

Cyril Myers – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 145).

Maury Adler – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 146).

George Miller – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 147).

Emmett Canard – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 148)

A special verdict is found at page 149 of the Clerk's Transcript, defining that the objects of the conspiracy were:

1. To offer bribes, in violation of section 67 of the California Penal Code.

2. To accept bribes, in violation of section 68 of the California Penal Code.

3. To violate the laws relating to bookmaking, in violation of section 337a of the California Penal Code.

4. To obstruct justice and the due administration of the laws as pertain to bribery and bookmaking, in violation of section 182.5 of the California Penal Code.

Jurors were polled and all answered that it was their verdict in the affirmative (C.T. p. 143).

Sentences were as follows:

Peter Stafford – Sentenced to state prison for the

term prescribed by law for the crime of conspiracy (section 182 of the Penal Code, as charged in Count I) (C.T. p. 203).

Cyril Myers – Probation five years, proceedings suspended, six months in county jail, and $5,000 fine (C.T. p. 201).

George Miller – Proceedings suspended, probation five years, sixty days in county jail as condition, and fine of $2,500 (C.T. p. 289).

Emmett Canard – Probation five years, proceedings suspended, ninety days in county jail, and $1,000 fine (C.T. p. 202).

Notices of appeal were duly filed (C.T. pp. 204-212) and bail fixed upon appeal.

OPINIONS BELOW

Trial in the Superior Court was by a jury. The opinion of the court below, the Court of Appeal, Second Appellate District, State of California, is appended hereto as Appendix "A" and is also found in the clerk's record below. The opinion of the Court of Appeal was filed December 26, 1967, and is reported at 257 A.C.A. 500.

After affirmation by the Court of Appeal, a timely petition for hearing was filed with the Supreme Court of the State of California, and was denied February 19, 1968, and is reported in the minutes 68 A.C.; Pamphlet No. 8, March 1, 1968, page 3.

A petition to recall the remittitur was duly lodged with the Court of Appeal of the State of California but, by that court, denied. Subsequently, a petition to recall the remittitur and an application to the Supreme Court of California for stay

of execution was filed, and said petition has as yet not been acted upon by the California Supreme Court. The within petition, however, must be filed so that it will be timely filed with this Court, regardless of the decision at this time on the motion to recall the remittitur lodged with the California Supreme Court. The trial court, the Superior Court of California, has granted a stay of execution to permit the timely filing of this petition for certiorari with this Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 26, 1967 (reported at 257 A.C.A. 500). A timely petition was filed with the Supreme Court of the State of California and was, by that court, denied on February 19, 1968 (reported in the minutes of 68 A.C., Pamphlet No. 8, March 1, 1968). The statutory provision believed to confer on this Court jurisdiction to review the judgment in question, by writ of certiorari, is 28 U.S.C. 1255(f).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, section 19, of the Constitution of the State of California; and sections 67, 68, 337a and 182.5 of the Penal Code of the State of California.

QUESTIONS PRESENTED FOR REVIEW

1. The trial court erred in permitting cross-examination of petitioner Peter Stafford as to testimony given by him before the grand jury. It is our contention that the testimony before the grand jury was given by Stafford under compulsion.

2. Petitioner Stafford was denied a fair trial and due process, in violation of the Fourteenth Amendment to the United States Constitution, by reason of his detention and unlawful search and the use of the fruits thereof at the trial. The search was in violation of the Fourth and Fifth Amendments to the United States Constitution and Article I, Section 19, of the Constitution of the State of California.

3. The trial court erred in denying a mistrial when Officer Gunn testified that in a conversation with DeMaddalena about Stafford and Stafford's access to "muscle" – setting up individuals for a working over – he had asked if Lipowitz, a bookmaker, was one of the persons and DeMaddalena had replied yes, and the resulting unfavorable publicity in the press and on television news.

4. The interception of a telephone call between Officer Gunn and Sgt. Stafford and the use of the recording of the conversation was in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution and 28 U.S.C. 605, the Federal Communications Act. (There are numerous other interceptions which we complain of, which were subsidiary to this and which will be treated in the argument covering this point.)

5. The evidence was insufficient to sustain the judgment of guilty as to Count I as to any of the defendants.

STATEMENT OF THE CASE

By an indictment filed by the grand jury of the County of Los Angeles, State of California (Clerk's Transcript–herein C.T.–pp. 1–10) and an amended indictment (C.T. p. 13), Peter E. Stafford and Henry DeMaddalena–who it is charged were members of the Los Angeles Police Department– and Emmett Canard, Cyril Myers, Maury Adler and George Miller were charged, in Count I, with the offense of a felony, namely, conspiracy to violate sections 67, 68, 337a and 182.5 of the Penal Code of the State of California, in that on or about the 15th day of February, 1964, and continuously thereafter to and including the 20th of March, 1964, the above-named defendants, together with other persons, did, at and in the County of Los Angeles, State of California, unlawfully, corruptly and feloniously conspire, combine, confederate and agree: **First:** to offer and give bribes to executive officers in the State of California, in violation of section 67 of said Penal Code; **Second**, to ask for and receive bribes for executive officers, ministerial officers, employees and appointees of the City of Los Angeles, in violation of section 68 of said Penal Code; **Third**, to engage in pool selling and bookmaking, in violation of section 337a of the said Penal Code; and **Fourth**, to pervert and obstruct justice and the due administration of the laws pertaining to pool selling and bookmaking and offering, giving, asking for and receiving bribes, in violation of section 182.5 of said Penal Code. Thereafter numerous overt acts were named.

Count II charged Henry DeMaddalena with offering and giving a bribe to an executive officer in the State of California, in violation of section 67 of the Penal Code, a felony, in that

on or about the 15th day of February, 1964, the said DeMaddalena did wilfully, unlawfully, feloniously and corruptly offer and give a bribe to Joseph Gunn, an executive officer in the State of California, to wit, a member of the Los Angeles Police Department, with the intent then and there to wilfully, unlawfully, feloniously and corruptly influence the actions, decisions, and opinions of the said Joseph Gunn in the performance of his duties as a member of the Los Angeles Police Department. (C.T. p. 3)

Count III charged DeMaddalena with offering and giving a bribe to an executive officer in the State of California, in violation of section 67 of the Penal Code, a felony, in that DeMaddalena did wilfully, unlawfully, feloniously and corruptly offer and give a bribe to Joseph Gunn, a member of the Los Angeles Police Department, with the intent then and there to wilfully, unlawfully, feloniously and corruptly influence the actions, decisions and opinions of the said Joseph Gunn in the performance of his duties as a member of the Los Angeles Police Department. (C.T. p. 4)

As provided by section 995 of the California Penal Code, motions for each defendant were made to set aside the indictment. Said motions were argued and submitted. The motions were denied, and the defendants entered pleas of "Not Guilty." (C.T. p. 17)

A motion to suppress evidence was filed March 4, 1965, on behalf of defendant Peter Stafford (C.T. p. 32). A notice of motion to suppress was also filed March 4, 1965 (C.T. p. 34). Said motion also contained a request to examine certain recordings, tapes, and other documents and statements, pursuant to the right of discovery. The motion for discovery was granted except as to one item; i.e., Item 6 thereof. The District Attorney

indicated that he did not have the requested statements. (C.T. p. 39)

C. McCoy was relieved as counsel and Deputy Public Defender I. Garfinkel was appointed on behalf of Henry DeMaddalena (C.T. p. 40).

On April 12, 1965, the case was called for trial; the motion to suppress was denied at that time, without prejudice; the motion to set aside the plea in order to have the court reconsider the former ruling on motion pursuant to 995 P.C. was denied; and the reporter was ordered to prepare an original and four copies of daily transcript (C.T. p. 42).

On April 15, 1965, trial commenced (C.T. p. 45).

On April 23, 1965, motions were filed on behalf of the defendants, requesting the court to poll the jurors re defense Exhibit D, a Sunset Edition of the Los Angeles Herald-Examiner newspaper—which was admitted into evidence (not to go to the jury), and said motions were denied. Defendants' motions for a mistrial were denied. Other exhibits were admitted into evidence (not to go to the jury): Exhibit K, a Los Angeles Herald-Examiner article dated April 19, 1965, and Exhibit L, a Herald-Examiner article dated April 23, 1965. Motions for the court to poll the jurors re Exhibit L and motions for mistrial were denied. The trial resumed. (C.T. p. 51)

A motion to suppress was made, witnesses were called (out of the presence of the jury), and People's Exhibits 3, 69 and 70 (each a notebook) were admitted into evidence (C.T. p. 53).

On April 28, 1965, Roger Matthews and Patricia Locricchio were granted immunity (C.T. p. 54).

On May 3, 1965, defendants offered Exhibits R and S (each a TV report of April 23, 1965), T (a Los Angeles Herald-Examiner newspaper dated April 23, 1965), and U (a newspaper

clipping dated April 27, 1965), and said exhibits were admitted into evidence (not to go to the jury). Defendants' motion to strike and motion to poll the jury re Exhibits R and S and motion for mistrial were denied (C.T. p. 57).

On May 3, 1965, the People rested (C.T. p. 57). Defendants' motion asking the court to invoke section 1385 of the California Penal Code, and dismiss, was denied.

On May 5, 1965, in support of objection to certain testimony, Peter Stafford testified (out of the presence of the jury). The court overruled the objection. (C.T. p. 59)

On May 10, 1965 (C.T. p. 62) Defendants' Exhibit Y, a newspaper clipping, was received in evidence.

Instructions given, consisting of some 62 pages, are found in the Clerk's Transcript commencing at page 71. Instructions refused are found beginning at page 134 of the Clerk's Transcript.

Motions for a new trial were made and notice of intention to move for a new trial was filed by defendants Emmett Canard and Peter Stafford. (See written Notice of Intention To Move For New Trial – C.T. pp. 157-178)

A Notice of Intention To Move For New Trial was filed by defendants Adler, Myers and Miller (C.T. p. 184).

All motions for new trial were argued by counsel and by the court denied (C.T. pp. 193-197).

SUMMARY OF THE EVIDENCE

In the interest of brevity of this petition, facts pertinent to the determination of the appeal and this petition are set forth in a footnote[1].

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[1]Commencing at page 46 herein.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME

I

The Trial Court Erred In Permitting Cross-Examination Of Petitioner Peter Stafford As To Testimony Given By Him Before The Grand Jury. It Is Our Contention That The Testimony Before The Grand Jury Was Given By Stafford Under Compulsion.

May we direct the Court's attention to page 28 of Appendix "A" attached hereto, wherein the Court of Appeal, in passing upon this question raised on appeal before it, used the following language:

> "The prosecution, in its cross-examination of Stafford, was permitted to refer on occasion to his testimony given before the grand jury. The evidence establishes that defendant was told before he appeared before the grand jury, pursuant to subpoena, that if he refused to testify by invoking the Fifth Amendment, it meant dismissal from the force. Defendant testified, on redirect examination, that he knew, if he refused to testify, he would be fired. When the prosecutor sought to impeach him through the use of his grand jury testimony, the defense objected that the testimony was involuntary, being the product of coercion.
>
> "In *Garrity v. New Jersey* (1967) [385] U.S. [493], 17 L.ed 2d 562, decided during the pendency of this appeal, the Supreme Court held that (at p.___), '. . . the protection of the individual under

the Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.' The defendants in *Garrity* were police officers who, before being questioned about an investigation concerning the fixing of traffic tickets, were told that anything they said could be used against them in state criminal proceedings; that they had the privilege to refuse to answer if the disclosure would tend to incriminate them; but that if they did refuse to answer they would be subject to being removed from office.

"The same principles which operate to exclude involuntary confessions of an accused, also require exclusion of involuntary admissions where sought to be used as affirmative evidence of guilt. (*People v. Atchley*, 53 Cal.2d 160, 169-170.) It is further established that an accused's involuntary confessions may not be used to impeach him. (*People v. Underwood*, 61 Cal.2d 113, 120-121.) This being so, the court in *Underwood* concluded (at pp. 120-121), '. . . a similar rule should operate to exclude involuntary *admissions* when they are offered for that purpose . . . [Citations.]' Any prior inconsistent statement of the accused relative to the offense charged, constitutes an admission within the meaning of the principles regarding admissibility of involuntary statements, where used to impeach his credibility. (*People v. Atchley, supra*, 53 Cal.2d 160, 170; *People*

v. Underwood, supra, 61 Cal.2d 113, 121-122.)

"The prosecution sought in the following instances to impeach Stafford using his grand jury testimony:

"Stafford testified that on March 13th he found two notebooks in the office while he was cleaning a file cabinet. One of the books had the note attached 'Possibly came out of NZK 002, a 1962 blue Ford.' He wrote the number in his notebook and called the Department of Motor Vehicles to attempt to locate where the notebooks belonged. He had lost a notebook himself and the next day he called the motor pool and inadvertently gave that number as the number of the car he had used. 'And what happened, I just made a mistake, and since I had this number on my mind, I ran NZK 002 instead of the number that I had out.' On cross-examination defendant was asked when it was he first recalled that he had mistakenly associated the number NZK 002 with the loss of his own notebook. He testified that it was after he had testified before the grand jury. He was then asked whether at the grand jury hearing he was questioned about the number. Defendant indicated that he had been asked about it; that at the time he testified before the grand jury he did not recall his mistake.

"Stafford testified on cross-examination that he knew his codefendant Canard to be a part-time bartender and gambler. The prosecutor, attempting to establish that Stafford knew Canard to be a bookmaker, referred to the fact phone numbers of book-

making establishments appeared next to Canard's name in Stafford's notebook. Stafford testified that he placed them there because he 'had to associate them with somebody' and he knew Canard hung around those locations. Stafford was then asked to read certain testimony he gave before the grand jury. He was then asked whether he believed these were Canard's places. The grand jury testimony referred to was never read into the record. Stafford testified that he had stated before the grand jury that the places may have belonged to Canard. He then indicated that it was rumored that Canard was engaged in bookmaking at those spots.

"The prosecutor asked Stafford about his relationship with Cyril Myers. Stafford testified he knew Myers as a gambler and heard he had loaned a bookmaker money for a bookmaking operation. It was then brought out that before the grand jury Stafford had testified that Myers 'was the money behind' some bookmaking. The defense objected that the grand jury testimony was not impeaching evidence; that there was nothing inconsistent about the former testimony.

"Finally, Stafford was questioned about the entry in his notebook 'make meet with Cy, Maury, Hank.' Defendant testified it referred to Gordon Jones, Hank Weldon and Maury Rissman. He stated that there was no arrangement to meet Myers and Adler at the Westward Ho Restaurant. He was then referred to his grand jury testimony. His former testimony was that he did not recall what the

notation meant or to whom it referred; he could not remember whether the 'Maury' referred to Maury Adler; there had been no prior arrangement to meet Myers, Adler or DeMaddalena at the Westward Ho. At this point the defense again objected this was not impeachment; that it was Stafford's testimony almost word for word."

Then the Appellate Court, in error, said:

"The jury was admonished that this line of questioning was admissible solely on the issue of Stafford's credibility as a witness.

"Manifestly, the use of the grand jury testimony had little, if any, impeaching effect (as the defense was quick to point out at the time the prosecution sought to employ it). If *Garrity, supra,* applies, retroactively, to this case, the trial court was in error in permitting the prosecution to use Stafford's grand jury testimony in impeaching him. Whether or not that decision will be so applied has not yet been decided by the Supreme Court of this state. We need not decide it here, since, assuming that error was committed, it was not prejudicial. Beyond a reasonable doubt, the error in permitting the use of the grand jury testimony could not have prejudiced Stafford. (*Chapman v. California* (1967) 386 U.S. 18, 24.)" [Appendix "A" pp. 28-31.]

As will be more fully demonstrated hereinafter, from the time of Stafford's being stopped in the schoolyard where he was delivering his young son, he was under compulsion. Certainly, as we will point out later in the argument hereunder, Stafford was prejudiced by the use of his testimony before the

grand jury in an attempt to impeach him before the trial court.

In giving a fair appraisal of the Police Department toward Stafford and the compulsion used upon STafford to compel him to testify, one must have a whole picture of his treatment by his fellow police officers.

A motion to suppress was timely made at the outset of the trial and was continued by the court and heard during the course of the trial (the motion to suppress and notice of motion are found in the Clerk's Transcript at pages 32 to 34). The motion to suppress was heard by the court and denied without prejudice. In addition to the motion to suppress, the record is replete with objections to the taking of Stafford's books and papers and the use being made thereof. A particular hearing and evidence was taken in support of the motion to suppress (to be found commencing at page 1289 of the Reporter's Transcript). At that phase of the case, Stafford testified that he had been on the police force since February of 1948; that he had the rank of sergeant and was assigned to Central Vice; and that he was watch commander. He lived with his family in Temple City. He had children–ages 15, 13 and 9. His 9-year-old boy has rheumatoid arthritis and is emotionally disturbed. (R.T. p. 1290) On the morning of March 20, 1964, the boy started for school. He observed that the boy had not gone to school but was playing, and he took the boy to school. He had just let the boy out at the school (St. Luke's in Temple City, California) when Officer Judd came up and said, "Pete, I'm Sergeant Judd. You are a suspect in a personnel investigation. Take everything out of your pockets and get out of the police car." (R.T. p. 1291) He took Exhibits 69 and 70 (the black and brown notebooks) and laid them on the seat of the car; these were his books; he had purchased them;

he had had them; he had had the contents of one of them for three or four years. He took his gun belt off, his gun, his handcuffs and ammunition and laid these items on the seat. He also laid on the seat his badge and identification cards. Lt. Hill approached. Hill searched him. Stafford did not consent to the search. Stafford was told to get in the back of the police car and to get on the prisoner's side (the right rear side). (R.T. p. 1293) This he did. Other officers got in–Lt. Devin and Capt. Nelson. They then drove him to the Sunny Cal Motel at 225 West Valley Boulevard in South San Gabriel, outside the city limits of Los Angeles. [Note: This was in violation of the rule in *People v. Martin,* 225 A.C.A. 121.] This was about 8:20 to 8:30 in the morning. When he arrived at the motel, there were three or four policemen there; Sgt. Zabel was one of them and Sgt. Briggs, Sgt. Judd, Lt. Hill, Lt. Devin and Capt. Nelson. After they arrived in the room, Hill told Stafford, "Remove your clothing." He removed his coat and shirt and trousers, and then Hill said, "Take all your clothes off." Stafford replied, "I don't want to take my shorts off." Hill stated,"*I am ordering you as a Lieutenant of Police to either take your shorts off or I'll tear them off of you.*" (Our emphasis.) (R.T. p. 1295) Stafford then removed his shorts; he was in the nude. He stood there for a minute or two and was then told to bend over and spread his buttock. He did this. Hill got down and looked up his rectum. Hill then examined his private parts, told him to lift his scrotum up. Hill then told him to put his clothes back on. At no time did they show Stafford a warrant of arrest or a search warrant. At no time did they advise Stafford of his constitutional rights; that he was entitled to talk to a lawyer or consult with a lawyer or obtain the services of a lawyer.

After Stafford was dressed, Captain Nelson talked with him. Periodically throughout the time in the motel they asked him questions. [The Court of Appeal was in error in its estimate of time – Appendix "A" p. 10.] Stafford was at the motel until 1:30 in the afternoon. He asked permission to go to the rest room and was told to keep the door open. One of the officers walked with him into the lavatory. Stafford had made no effort at any time to leave the building. (R.T. pp. 1297, 1298) Stafford suffers from a physical infirmity–he has to eat often; he has trouble with his pancreas. Around one o'clock they brought him a cheese sandwich. About two o'clock they took him to the police building, to an interrogation room. He was told to look at a wall and not to turn his head. He was kept there from 2:00 until 5:00 or 6:00. Sometimes two and three officers were there. (R.T. pp. 1298-1300) He was questioned by Lt. Sporrer. He was questioned later that evening, for an hour or so, by Inspector Collins and Sgt. Arnold. They had a stenographer there. At no time was he advised of his constitutional rights. (R.T. p. 1301) At no time was he advised that he had a right to remain silent. They told him that if he refused to answer, he would be charged with insubordination. (R.T. p. 1302) He was driven home by Lt. Hill and Sgt. Zabel, about 1:00 a.m. the morning of the 21st. (R.T. p. 1302) They searched his car and his garage. He told them no, but they searched it anyway. When he objected, they said, "That's too bad. We're going to search it anyhow. What do you think of that?" (R.T. 1302) They searched the car and removed something. He knew that if he did not answer the questions put to him that day by the officers, he would be disciplined; he felt that the consequences of discipline under those circumstances

would be dismissal. (R.T. p. 1312) He knew that he could be fired for insubordination. (R.T. p. 1313)

At this point in the trial, reference was made to the entry into evidence of Exhibits 3 (DeMaddalena's notebook), 69 and 70 (Stafford's notebooks). Objection was made that these exhibits were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Section 19, of the California Constitution; and in violation of the rules laid down in *People v. Cahan,* 44 Cal.2d 434; *Escobedo v. Illinois,* 378 U.S. 478; *Massiah v. United States,* 377 U.S. 201; and *People v. Dorado,* 62 Cal.2d 338. The trial court was then referred to the case of *People v. Perez*, which had just been decided by the Second Appellate District of the State of California, and also the case of *People v. Collins,* decided by the Fourth Appellate District of the State of California. (R.T. p. 1314) The trial court's attention was called to the fact that *Collins* was a recent case, not at that time reported, and that *Perez* was not reported; that both cases had resulted in reversals because the men involved had not been advised of their constitutional rights. (R.T. p. 1314)

The conduct of the police officers in taking this man from a schoolyard, without a warrant of arrest, without a search warrant, and proceeding to take him out of the City of Los Angeles to an isolated motel and there to search him, to compel him to disrobe, and Lt. Hill then to compel him, in his nude state, to bend over and have his rectum examined, *is an outrage – a violation of the man's civil rights. This was a form of compulsion.* This man was told that if he did not answer questions, he would be disciplined. He knew that meant discharge. While he was in the room at the motel, his books and

papers were taken from him, and repeatedly throughout the trial of this matter this evidence was used against him. [Note: At this point we wish only to deal with the compulsion used upon Stafford to compel him to testify, and under point II we will discuss the illegal search and seizure and the use of the fruits thereof at the trial.]

Subsequent to the foregoing testimony, Stafford testified on the limited issue of the voluntariness of his statements before the grand jury.

Prior to testifying before the grand jury (and he believed it was the beginning of the second week in April of 1964) Captain Mills had called him to his office, together with Sgt. Phelps, Lt. Ingram and Officer Burke, and they had all been given subpoenas. (R.T. p. 2305) At that time Captain Mills (Commander of the Division of Internal Affairs) stated, "You know that you are police officers and that you cannot take the Fifth Amendment. . . . If you do take the Fifth Amendment, you'll be fired. You understand that, don't you?" And Captain Mills then nodded to each of them. (R.T. p. 2306) Stafford next had a conversation with Lt. Sporrer with reference to appearing before the grand jury. This was about March 24, 1964, in the interrogation room of the police building. He was being questioned at that time by Sgt. Arnold (attached to Intelligence Division), Lt. Sporrer (Arnold's superior officer) and Captain Mills. Lt. Sporrer said, with reference to the grand jury, "You know, Pete, you can't take the Fifth Amendment, being a policeman, if you go before the grand jury, or you'll be fired." (R.T. pp. 2306, 2307) He went before the grand jury because he did not want to lose his job; he had a trial board pending, in fact, at that time there were not any charges even brought against him. He had

been on the police force almost 17 years and did not want to lose the job and the $400 per month pension for the rest of his life a few years hence. (R.T. p. 2307)

On cross-examination Stafford stated that Captain Mills said to them, "You know, as policemen you can't take the Fifth Amendment or you'll be fired." (R.T. p. 2308) Stafford's attention was then directed to his testimony given before the grand jury wherein he was advised by the prosecutor that he might be indicted, was asked if he had talked with his attorney, and was advised that he did not have to testify if he did not want to (R.T. p. 2310); and it was then brought to Stafford's attention that at that time he had stated that he was not being forced to testify (R.T. p. 2311). On redirect examination it was brought out that Stafford's state of mind at that time was that he knew if he refused to testify he would be fired. In the grand jury room he was not permitted to have a lawyer present; the proceedings there were secret; and the only persons present at the time these proceedings took place were members of the grand jury, the prosecutor and himself. (R.T. p. 2314)

Stafford was then cross-examined with reference to other testimony he had given before the grand jury.

He was questioned about his testimony before the grand jury with reference to the telephone number DUnkirk 3-1049 and a slip of paper he had found outside of the Rex Billiard Hall. (R.T. 2326) There were three numbers; he did not obtain these numbers from Canard; he put them near Canard's name for association; he knew Canard as a gambler more than as a bookmaker; he knew Canard hung around the Crown Hill area (Third and Bixel Streets, Los Angeles) and four or five

other people hung around there and there was some bookmaking going on there, but who was the bookmaker per se he really did not know; he thought Canard either had knowledge or might have something to do with it. (R.T. p. 2328) When an informer gave him the number NOrmandie 2-1649 he put that by Canard's name, because the informer said that this man hung around the Crown Hill area. (R.T. p. 2328) Exhibit 69, tag No. 2, an entry "Emmett Canard," the number there was Canard's home phone, DUnkirk 9-2060; then Canard had changed his number to DUnkirk 9-0888; another number, HU 3-9373, was given to him by an officer who said this was the Pink Pony Bar; it was next to Canard's name as one of the officers had seen Canard come out of there. (R.T. p. 2330) Once Canard had asked him about how to transfer a pool hall license and he had directed Canard to Sgt. Phelps. (R.T. pp. 2333, 2334) Regarding some testimony he had given to the grand jury (to the effect that Myers was reputed to have been the money behind some gambling and "I couldn't come out and say that he was bookmaking, because I never myself ever saw him take a bet . . . it is more than a rumor. It has been known that he [Myers] does back some bookmaking in a financial way") over objection he stated that he had so testified.

Further with reference to petitioner Stafford's testimony before the grand jury, he testified that he had been served with a subpoena about April 14th or 15th while in Capt. Mills' office with Sgt. Phelps, Lt. Ingram, and Officer Burke. (R.T. p. 2454) Capt. Mills handed a subpoena to him and said, "I'm ordering you to testify before the grand jury. Here is your subpoena. If you don't testify, you know that it means dismissal." (R.T. pp. 2454, 2455) He understood what Capt. Mills

meant; that it meant dismissal if he did not testify. He understood that when he appeared before the grand jury. He knew that an officer had to appear before the grand jury. No one connected with the grand jury or the District Attorney's office had told him that he did not have to appear before the grand jury. (R.T. p. 2455) Before going before the grand jury he talked with Lt. Sporrer about appearing before the grand jury. Sporrer had interrogated him about the 24th of March in one of the interrogation rooms in Internal Affairs. He knew at that time that Lt. Sporrer was a lieutenant of police. Sporrer at that time said, in substance, "You know, Pete, that a policeman can't take the Fifth Amendment. You are going to have to testify before the grand jury." Sporrer said, "You know you can't refuse to testify. If you do, it means dismissal." (R.T. p. 2456) When he appeared before the grand jury and Mr. Busch (of the District Attorney's office) had made the statement to him [i.e., that he might be indicted and that he did not have to testify if he did not want to], he was frightened; he knew he had to testify; he could not refuse to testify or he would be dismissed from the force; there was no choice; he had to testify; he had had the experience at the motel on March 20th; he had substantial pension rights; he had a little over three years to go for a full pension for the remainder of his life. (R.T. p. 2457) He was not told by anybody before the grand jury that he could get up and walk out and did not have to testify. He did not understand that he had the right to walk out and not testify. He thought he could not take the Fifth Amendment; he knew he had to answer the questions, otherwise he was subject to dismissal from the police force. That he could not take the Fifth Amendment he thought to be a rule of the Police Department. He did not voluntarily go

before the grand jury. He was given the subpoena and was instructed by Capt. Mills. He did not ask permission to enter the grand jury room and testify. He was actually called into the grand jury room by the bailiff at the grand jury proceedings; he was sworn to testify; and they proceeded to question him. (R.T. p. 2458) His attorney was not in the grand jury room and was not nearby; he did not know where his attorney was at the time.

May we point out that the record is completely silent as to any police officer of the City of Los Angeles denying the testimony of Stafford to the effect that he had to testify and that if he did not testify, or should he take the Fifth Amendment, he would be discharged.

Captain Mills testified (R.T. pp. 949-950), in effect, that he was a Captain of the Los Angeles Police Department, Commander of Internal Affairs, with complete authority delegated to him by Chief Parker in disciplinary matters. He recalled that prior to the hearing before the grand jury Sgt. Stafford, Sgt. Phelps, Officer Burke and Lt. Ingram were in his office. He was not certain if they were subpoenaed there. He might have told them that if they took the Fifth Amendment and refused to testify before the grand jury there was a rule in the Police Department that they well could be suspended or their services terminated, or words to that effect. (R.T. p. 971) This was a rule of the Police Department at the time –they do not have to testify, but if they chose not to testify, they do not have to be members of the Police Department; in other words, it was grounds for termination or suspension of their services. (R.T. p. 971)

We respectfully call the Court's attention to the Official

Reporter's Transcript at page 2299 where there was considerable discussion about the District Attorney cross-examining Mr. Stafford regarding his testimony before the grand jury. At that time we contended, and advised the court fully as to our position on this particular matter, that both Lt. Sporrer and Captain Mills had said to defendant Stafford, "If you go before the grand jury and take the Fifth Amendment, you are subject to discipline and discharge"; further, that Stafford believed that he would be discharged if he did not testify; and so, therefore, under compulsion and by reason of the treatment which had been accorded him when he was picked up at the schoolyard and interrogated at the motel and through the night, Stafford believed that he had to testify in order to save his job, that he felt at that time that he had a reasonable chance of saving his job, and that, for this reason, he did testify.

As was said in *People v. Underwood*, 61 Cal.2d 113, at 121:

> "Before confessions or admissions may be used against the defendant, the prosecution has the burden of showing that they were voluntary and not the result of any form of compulsion or reward."

Underwood cites a number of cases.

Concerning his testimony before the grand jury wherein Stafford stated that he was not being forced to testify, in reply to counsel's question, Stafford stated:

> "Q [By Mr. Parsons] Were you still of the same opinion -- what was your state of mind even after Mr. Busch had advised you as he apparently did?

"A [By Stafford] Well, I knew that if I refused to testify I'd be fired." (R.T. p. 2314)

The trial court denied our objection that Stafford was under any compulsion. (R.T. pp. 2316-2317) The court then instructed the jury that any examination of Mr. Stafford was only for the purpose of testing his credibility and it was not to be considered by them as against Mr. Canard. (R.T. pp. 2323-2324)

Again at pages 2325-2326 and at page 2341 of the Reporter's Transcript, Stafford's attention was directed to testimony given before the grand jury. He was questioned concerning his meeting at the Westward Ho Restaurant with Adler, Myers and DeMaddalena. (R.T. pp. 2343-2344) Then, after our objection, the court spoke up and said:

> "As to whether or not the testimony that Mr. Stafford gave in connection with certain of these matters in cross-examination is impeaching by the testimony previously given before the Grand Jury, that is a matter for argument of counsel, and the jury will have to make the determination finally as to whether there was or was not impeachment." (R.T. p. 2344)

Again Stafford was questioned (see R.T. p. 2361) by the District Attorney about an entry which says, "Make meet with Cy, Maury and Hank." Stafford was required to explain that. See also page 656 of the testimony before the grand jury as quoted to Mr. Stafford at page 2361 of the Reporter's Transcript. Notwithstanding our objection, Stafford was questioned about the testimony regarding "Make meet with Cy, Maury and Hank.".

The Court of Appeal, on the final page of its opinion (Appendix "A" p. 31), said:

> "Manifestly, the use of the grand jury testimony had little, if any, impeaching effect (as the defense was quick to point out at the time the prosecution sought to employ it)."

The Court of Appeal goes on to say:

> "If *Garrity* . . . applies, retroactively, . . . the trial court was in error in permitting the prosecution to use Stafford's grand jury testimony in impeaching him."

The Court of Appeal then says:

> " . . . *assuming that error was committed, it was not prejudicial.*" (Emphasis ours.)

How can they possibly reason that way? This was highly prejudicial. Stafford's very testimony was questioned, and argument was made to the jury that he had told, in effect, two different stories. Certainly it was prejudicial – highly prejudicial. If it was not prejudicial, why did the prosecution use it; no skilled prosecutor would jeopardize his case unless he thought he was dealing a hard blow.

As an example of this, the prosecutor, in his final argument, read to the trial jury some of Stafford's testimony before the grand jury. (R.T. pp. 3248-3249) That this impressed the jury is established by the fact that on May 19, 1965, the foreman of the jury (R.T. p. 3263) asked to have Stafford's grand jury testimony read to the jury. A portion of the testimony read to the jury is found on pages 3269 through 3276 of the Reporter's Transcript. This was done just before the jury reached a verdict of guilty.

There can be no question that the use of the grand jury

testimony was prejudicial.

We respectfully urge that *Garrity v. New Jersey* (1967) 385 U.S. 493, 17 L.Ed.2d 562, is ample authority for our position that this testimony before the grand jury, and the basis for the cross-examination, was obtained from petitioner Stafford under compulsion. This plan and scheme of compulsion was started at the very time Stafford was picked up at the schoolyard delivering his young son to school.

We respectfully urge that *Garrity, supra,* is ample authority for the granting of a hearing by this Court and a reversal of this case.

As was said in *Garrity*:

> "The choice imposed on appellants was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers v. Florida,* 309 U.S. 227, and related cases can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn v. Alabama,* 361 U.S. 199, 206. Subtle pressure (*Lyra v. Denno,* 347 U.S. 556; *Haynes v. Washington,* 373 U.S. 503) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' *Lisenba v. California,* 314 U.S. 219, 241."

II

Petitioner Stafford Was Denied A Fair Trial And Due Process, In Violation Of The Fourteenth Amendment To The United States Constitution, By Reason Of His Detention And Unlawful Search And The Use Of The Fruits Thereof At The Trial. The Search Was In Violation Of The Fourth And Fifth Amendments To The United States Constitution And Article I, Section 19, Of The Constitution Of The State Of California.

As has been stated, a timely motion to suppress was made at the outset of the trial and was continued by the trial court to be heard during the course of the trial. (Motion and notice–C.T. pp. 32-34) The motion to suppress was heard by the court and denied without prejudice. In addition to the motion to suppress, the record is replete with objections made to the taking of Stafford's books and papers and the use being made thereof.

Objections were made to the entry into evidence of Exhibits 3 (DeMaddalena's notebook), 69 and 70 (Stafford's notebooks), the objections being that these books were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution, and in violation of the rules laid down in *People v. Cahan, supra,* 44 Cal. 434, *Escobedo v. Illinois, supra,* 378 U.S. 478, *Massiah v. United States,* 377 U.S. 201, and *People v. Dorado, supra,* 62 Cal.2d 338. The defense then referred to other recent California cases.

The conduct of the police officers toward Stafford–seizing him in a schoolyard, without benefit of a warrant of arrest or

reasonable cause or a search warrant, taking him out of the city of Los Angeles to a motel, there keeping him a prisoner and forcing him to disrobe, and then examining his private parts–we repeat–*is an outrage and a violation of a man's civil rights.* It was done for only one purpose: to break this man down. It was a part of their plan of compulsion, further exemplified by their instructing him that he could not avoid going before the grand jury and testifying, that he could not take the Fifth Amendment, and that if he did so he would be discharged.

The law is now well settled in both the United States and California with reference to search and seizure, and is laid down in the basic case of *People v. Cahan, supra,* which was approved in *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 1439.

It is our contention that Stafford was under arrest the minute he was ordered out of the car and taken to the motel. In fact, while in the schoolyard, he was told to sit in the rear of the car in the "prisoner's seat," which is the right rear side of the car. As was pointed out in *Henry v. United States,* 368 U.S. 98:

> "An arrest takes place the minute his liberty is restricted."

It is our contention that, without question, since *Mapp v. Ohio,* 367 U.S. 643, which is supported by *Malloy v. Hogan,* 378 U.S. 1, the states are bound by the federal rules and the United States Constitution. Our California state courts must follow the exclusionary rule.

As was said in *Mapp v. Ohio, supra:*

> "Today we once again examine Wolf's constitutional documentation of the right to privacy, free from unreasonable state intrusion, and after a dozen years

> on our books are led by it to close the only court-room door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right reserved to all persons as a specific guarantee against that very same unlawful conduct."

We contend that all evidence by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. We further contend that the search conducted after the arrest, or detention, or whatever you may call it, of Stafford and taking him to the motel was too remote. It was purely an exploratory search, for the purpose of degrading Stafford, and was a form of compulsion to break him down in the hope that he might say something and would later admit something, if there was anything to be admitted.

People v. Mills, 148 C.A.2d 392, covers the law quite fully in this regard, with reference to exploratory searches, and cites as authority *United States v. Rabinowitz,* 339 U.S. 56.

Subsidiary to the principal question of search and seizure is the question of whether or not there was a voluntary consent given by Stafford. The facts of this case belie any such consent. Stafford denied that there was any consent, and the court's have repeatedly held that consent to a search must be free and voluntary and not as a result of compulsion; otherwise, it will not be regarded as consent. (See *People v. Michael,* 45 Cal.2d 751; *United States v. DiRe,* 332 U.S. 581; also *People v. Haven,* 59 Cal.2d 713.)

III

The Trial Court Erred In Denying A Mistrial When Officer Gunn Testified That In A Conversation With DeMaddalena About Stafford And Stafford's Access To "Muscle"–Setting Up Individuals For A Working Over–He Had Asked If Lipowitz, A Bookmaker, Was One Of The Persons And DeMaddalena Had Replied Yes, And The Resulting Unfavorable Publicity In The Press And On Television News.

This episode, which we contend was highly prejudicial and could not be cured by any instruction or the instruction which the trial court gave, was precipitated by Officer Gunn in testifying regarding a conversation with DeMaddalena. Gunn continually put words in DeMaddalena's mouth, throughout his questioning of DeMaddalena, in the hope that he could set up something. For instance:

> "I asked DeMaddalena if he wasn't afraid of Stafford because he had planned to cut Stafford out of the operation when he [Stafford] left Central Vice. And DeMaddalena stated that even though Stafford was supposed to be a mean guy he thought that he could handle him. He told me that Stafford had access to muscle and had set up several individuals in the past for a working over. I asked him if one of these individuals was a bookmaker named Lipowitz, and he stated yes, that Stafford had set him up for a working over with a baseball bat.
>
> "MR. PARSONS: I move to strike it as immaterial, irrelevant and incompetent to any issue in this

case.

"THE COURT: The motion to strike is denied." (R.T. pp. 359, 360)

May we point out that in the opinion filed by the Court of Appeal (Appendix "A" p. 23) the court said, referring to this testimony:

"This testimony was elicited without objection. After it had been received, a motion to strike was denied. However, later in the trial—on May 3, 1965—the court granted defense motions to strike it."

May we further point out that the testimony was elicited in such a manner that little or no opportunity was afforded to object; but as soon as was possible, counsel for petitioner Stafford moved to strike it, and the trial court, as has been shown above, promptly denied the motion.

Not all of the newspaper and television publicity about which we complain related to the aforesaid Lipowitz incident, but all of the following were given community-wide circulation, and they were in the leading Los Angeles newspapers or over local TV channels and, of necessity, must have prejudiced the trial of these petitioners.

Numerous newspaper articles were offered in evidence to establish our contention on this point. One of them was headed: "POLICEMAN NAMED IN BOOKIE PAYOFF." "EX OFFICER TELLS JURORS OF DEALS." "EX OFFICER SAID WHAT HE WAS SUPPOSED TO DO FOR THE MONEY WAS TO KEEP THE HEAT OFF OF AN ALLEGED BOOKMAKING SHOP CALLED 'THE TAXI DRIVERS' SOCIAL CLUB' AT THIRD AND LUCAS." (R.T. 901-903)

A motion was then made asking the court to poll the jury to ascertain who, if anybody, had read the articles. (R.T. 903-

904) The motion was denied.

Then an article appeared in one of the Los Angeles papers, to which the trial court's attention was directed, headed: "BIZARRE TALE OF BOOKIE'S REVENGE," and then in large type "BRUTAL BEATING OVER A $2 BET." This article was for sale at the newsstand in front of the Hall of Justice (in which building the matter was being tried). The article was to the effect that Stafford had one Lipowitz beaten up with a baseball bat. The testimony which sparked this publicity was elicited deliberately by the prosecution. (R.T. pp. 997-998) In the article it was stated that "Lipowitz carries the scar and trauma of the baseball bat and lead pipe beating about his head." (R.T. pp. 996-998)

A motion was then made for a mistrial (R.T. p. 998) and promptly denied.

It then appeared that Lipowitz was in the courtroom, and defense counsel asked permission to address the court, after which Lipowitz was ordered out of the courtroom. (R.T. pp. 1005-1008)

Again a motion was made to poll the jury, and again the motion was denied. (R.T. p. 1011)

TV programs given in Los Angeles were offered in evidence (Defendants' Exhibits R and S), and a motion for new trial was again made and again denied.

Many articles of a similar nature were offered in evidence—Defendants' Exhibit U. (R.T. pp. 2102-2103)

On April 23, 1965, at 5:00 p.m., the following occurred on a Los Angeles television news program, accompanied with close-up shots:

> "BAXTER WARD: This next item, coming up in a moment, is a shocker, and it's actually in two

parts, half now and half in our news later. We'll get to it after a word for American Home.

"(At this point commercial intervened.)

"A man that's figured prominently in the police-bookie ring trial of a fired Vice Squad sergeant, Sergeant Peter Stafford, is Sol Lipowitz on the right. Testimony already brought out information that Stafford had access to 'muscle' (they call it), and had marked Lipowitz, among others, for a working over. Sue Lipowitz spoke today of her husband's beating:

"SUE LIPOWITZ: Well, I went to the trial today. I wanted to see Peter Stafford. I wanted to see what a man looked like, an officer of the law, that could do such a thing as that. I just couldn't imagine that, - - all this time I had thought that it was gangsters and hoodlums. I had had no idea in the world that the police figured into it, because, during the time of this supposed investigation, I cooperated with them. I talked to them, and I had no idea that . . . .

"VINCE WILLIAMS (Interviewer): To be brief, Sue, exactly what did Peter [Stafford] do?

"SUE LIPOWITZ: Well, from the testimony that his fellow officers gave, Peter Stafford is the one who had Sol taken care of, so to speak . . . . "

In our Opening Brief before the Court of Appeal, we cited the case of *Sheppard v. Maxwell,* 384 U.S. 333, and quoted extensively therefrom (Opening Brief pp. 55-57), but the learned Court of Appeal disagreed with us (Appendix "A" pp. 24-25). With this we cannot agree. The adverse publicity

in *Sheppard,* while indeed damaging, pales into insignificance, in our opinion, when compared with the damning language used here.

At this point, may we take the liberty of excerpting from the *Sheppard* case a few of the profound observations of this Honorable Court:

> "But the Court has also pointed out that '[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' "
>
> " . . . [W]e did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' "
>
> "The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson v. Colorado,* 205 U.S. 454, 462 (1907):
>
> " 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.' "
>
> "Only last Term in *Estes v. Texas,* 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
>
> " 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused.

> Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' At 542-543.
>
> "And we cited with approval the language of Mr. Justice Black for the Court in *In re Murchison*, 349 U.S. 133, 136 (1955), that 'our system of law has always endeavored to prevent even the probability of unfairness.' "

IV

The Interception Of A Telephone Call Between Officer Gunn And Sgt. Stafford And The Use Of The Recording Of The Conversation Was In Violation Of The Fourth, Fifth And Sixth Amendments To The United States Constitution And 28 U.S.C. 605, The Federal Communications Act.

(There are numerous other interceptions which we complain of, which were subsidiary to this and which will be treated in this argument.)

The Chief of Police of the City of Los Angeles, the late William H. Parker, testified that there were numerous telephones throughout the Police Department which went through the City Hall switchboard. Also, there were some franchise phones that were direct and there were private telephones for the private business of the employees of the Police Department. Employees were not supposed to use the city phones for their private business. Chief Parker authorized the interception of the phones in Central Vice, so that they could record the conversations that

were taking place over these phones. (R.T. p. 55)

The record does not disclose permission by any city official except Chief Parker to intercept any telephone calls, nor any permission from the telephone company itself.

In addition to this, Officer Gunn testified that he had equipment on his phone to record conversations. He consented to have his phone monitored. He had a Revere tape recorder with an induction coil that went from the tape recorder to the telephone. He and his wife were given instructions on how to operate this equipment. (R.T. p. 242)

The recorded conversations used as evidence in this trial are as follows:

1. February 29, 1964 (transcript, People's 4; tape, People's 5) between Officer Gunn and DeMaddalena (R.T. pp. 266-272).

2. March 12, 1964 (transcript, People's 7; tape, People's 8) between Officer Gunn and Peter Stafford (R.T. pp. 292-294; Appendix "A" pp. 6-7).

3. March 12, 1964 (transcript, People's 9; tape, People's 10) between Officer Gunn and DeMaddalena (R.T. p. 306).

4. March 16, 1964 (transcript, People's 11; tape, People's 12) between Officer Gunn and DeMaddalena (R.T. pp. 328-332).

5. March 16, 1964 [by means of an electronic device worn by Officer Gunn] (transcript, People's 14; tape, People's 15) between Officer Gunn and DeMaddalena.

6. March 20, 1964 :

Officer Gunn to DUnkirk 7-1191 (transcript, People's 16)

Officer Gunn to SP 2-1623 (transcript, People's 17)

Officer Gunn to FR 1-6591 (transcript, People's 18) (Tape on these conversations, People's 19) (Appendix "A" pp. 11-17)

7. March 13, 1964 (transcript, People's 56; tape, People's 58) Stafford to dispatcher's office (R.T. pp. 1153-1154; Appendix "A" pp. 9-10).

8. March 13, 1964 (transcript, People's 57; tape, People's 59) Stafford to Motor Vehicle Department (R.T. p. 1151; Appendix "A" pp. 8-9).

Conversations 1, 2, 3, 4, 5 and 6 above were identified by Sgt. Jack William Herron, and conversations 7 and 8 were identified by Officer Jack Briggs. Sgt. Herron admitted that a very sensitive microphone was attached to the telephone itself; that it was activated by electrical current, an induction coil was attached to the telephone itself and to a tape recorder (R.T. pp. 321-322). Officer Briggs stated that in March of 1964 he received an assignment to monitor telephone conversations, extensions were put in the office of Internal Affairs by the telephone company. Extensions were connected with Central Vice. There is a box with phone wire leading to the instrument; there are screws acting as terminals and they attached two lead wires to two of the screws. They then plugged in to a Revere tape recorder. This had a telephone on it and they could pick up the conversations. They had to activate the machine by pushing a button, and this started the recording tape. The device then ran the sound to the tape recorder and they could hear it through the earphones or through the speaker of the phone being used. The minute someone in Central Vice picked up a phone and started to dial they could hear it. This was done pursuant to orders of Captain Mills. (R.T. 1062-1063) Officer Briggs stated that at the time he was listening and recording conversa-

tions he did not inform any of the parties that he was listening. He did not inform Sgt. Stafford that he was intercepting or about to record the telephone messages. He did not inform the person on the other end of the telephone that the message was to be intercepted and recorded. (R.T. p. 1070) The officer admitted that after the first interception, by going into the black box and effecting a connection, he monitored from 150 to 200 telephone calls. He never specifically at any time had permission from Sgt. Stafford to monitor any of these phone calls, nor permission of any person who originated the call, nor the person who received it. (R.T. p. 1080)

Objection was repeatedly made that these transcripts and tapes were obtained in violation of the Fourth, Fifth and Sixth Amendments and amounted to a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

We respectfully direct this Court's attention to the case of *Berger v. New York* (Oct. Term. 1966), 388 U.S. 41, in which there is a fair and complete discussion of eavesdropping on telephone calls.

The subject of eavesdropping and our objections thereto was fully covered in our Opening Brief before the Court of Appeal of the State of California, beginning at page 58, and supplemented in our Supplemental Brief before said Court of Appeal.

V

The Evidence Was Insufficient To Sustain The Judgment Of Guilty As To Count I As To Any Of The Petitioners.

We contend that no conspiracy was established.

As was stated in *People v. Samarjian,* 240 Cal.App.2d 13, quoting Miller, *Criminal Law* (1934) Sec. 32, p. 108, in footnote 2 at page 17:

> " 'It is essential to constitute the crime of conspiracy that there be an agreement or understanding between two or more persons that they shall act together. It is not necessary that the agreement shall be a formal one. It is sufficient if the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement. However, there can be no conspiracy without such an agreement, as neither the fact that two persons at the same time intend to do the same or similar act, nor the fact that one knows of the intention of another to do a particular act, . . . is sufficient for a conspiracy.' "

We believe that the evidence fell far short of establishing an agreement.

The use of a conspiracy charge has been repeatedly condemned by the courts. See *Krulewitch v. United States,* 336 U.S. 440, wherein it refers to the condemnation of its widespread use as shown by a report of the Attorney General of the United States. As was said in *Krulewitch:*

> "When the trial starts the accused feels the full impact of the conspiracy strategy. In other

> words, the conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. [Citing cases]"

The statements in *Krulewitch* are recognized by learned writers throughout the country, and here in California by Witkin in his work on *California Crimes,* Vol. 1, at page 102, where he makes the following statement and supports same by the foregoing quote from *Krulewitch:*

> "The conspiracy charge is a powerful prosecutor's weapon in cases where proof of the elements of the substantive crimes is weak, and it also makes admissible in a single trial the acts and declarations of each of the conspirators. . . . It has been argued, however, that the procedural and substantive flexibility of conspiracy prosecutions involve serious danger of unfairness to the defendant, and that their use should be curtailed."

In the instant case, a great mass of evidence was introduced, largely based on discussions between Gunn and DeMaddalena. There was much testimony about the activities of the police department, including the monitoring of hundreds of telephone calls, but, as we have respectfully asked throughout: Where is the evidence of an agreement (which is the essential part of a conspiracy)?

VI
ALLEGED "PROTECTED" NUMBERS

We contend it was prejudicial error by the trial court to deny to the defense the right to introduce in evidence the disposition of those cases in which arrests were made for alleged violations of Section 337a of the California Penal Code.

On March 20, 1964, various officers of the Los Angeles Police Department raided so-called "protected" numbers or locations. Much testimony was devoted to the arrangements for these raids, testimony of the officers conducting the raids, and testimony of some of the persons arrested at the so-called "protected" locations, but only in one instance was the final disposition of the matter given, the jury being told that the case against Emmett "Tommy" Canard had been dismissed. In our Closing Brief filed with the Court of Appeal of the State of California, Second Appellate District, we discussed with particularity the numbers that were inferred as being "protected." It was and is our contention that it was material to the defense to show to the jury what occurred after these numerous arrests, what the final dispositions were, so that the jury could determine fairly whether or not bookmaking was being conducted at these so-called "protected" locations or numbers. All the jury had before it, with the one exception of Canard, was the bare fact that arrests were made or that examinations were made at certain locations by the officers. It is our contention that the jury could have been left with only one inference: that, with the exception of Canard, "the fair inference was that [these locations] were . . . protected" (the quoted words have been borrowed from the Respondent's

Brief filed with the Court of Appeal, page 81 thereof).

During the March 20, 1964 raids, of a total of some 17 so-called "protected" numbers, arrests were made at the following:

1. DUnkirk 9-0888, 250 S. Reno St. - Emmett "Tommy" Canard. Found at this location - blank pad and adding machine.

2. DUnkirk 3-1049, 427 Grandview - Leo Luciano. No evidence of bookmaking found. Luciano had never heard of Stafford, had never seen Stafford.

3. MAdison 6-4572, 215 W. Fifth St. - Pat Locricchio. (Only a portion of this number was in Stafford's notebook.) Locricchio testified she did not know Stafford and was not being protected.

4. DUnkirk 4-0702, 228 S. Lake St. - Roger Matthews. (Complete number not in Stafford's notebook.) Matthews testified he did not know Stafford.

5. MAdison 5-8311, 935 Sun Mun Way - Jimmy Wong. No evidence of bookmaking found. Wong testified he did not know Stafford and was not being protected.

6. CA 5-3423, 5043 Huntington Dr. North - Sammy Wong. No evidence of bookmaking found. Wong testified he did not know Stafford and was not being protected.

Four other arrests were made on March the 20th, involving PL 9-0292, PL 9-2705, DU 2-1998, PL 0-3578. These phone numbers, we believe, could not, under any stretch of the imagination be deemed protected numbers. PL 9-0292 was in the handwriting of the clerk in the Vice Squad office, a Mrs. Welsher. PL 9-2705 was a number that Administrative Vice had on file. Concerning DU 2-1998, Officer Wyatt testified (R.T. p. 2505) that he and Sgt. Stafford had checked this location as far back as

1962; Stafford also testified about DU 2-1998 (R.T. p. 2419). PL 0-3578, not contended as having been protected so far as we can learn from the record, had particular significance because it was found in Stafford's notebook after his arrest.

We were denied an opportunity to show the disposition of these various cases, which we believe we had a right to do. This came under the heading of "Curative Admissibility in Criminal Cases," see Witkin, *California Evidence,* page 1174.

CONCLUSION

All of the points raised herein, including all federal issues, were plainly raised throughout the trial and again reiterated in the briefs before the Court of Appeal of the State of California and in the petition to the Supreme Court of California for a hearing. Although *Garrity v. New Jersey, supra,* 385 U.S. 493, was brought to the attention of the Court of Appeal, since *Garrity* and since our proceedings before the Court of Appeal, we have learned of *Uniformed Sanitation Men's Association, Inc. v. Commissioner of Sanitation of New York,* 36 U.S.Law Week 3304, 3308 (lower court citation 383 F.2d 364), and *Gardner v. Broderick, Police Commissioner,* 36 U.S. Law Week 3304 (lower court citation 20 N.Y.2d 227). These cases are on all fours with our contention that requiring petitioner Stafford to testify before the grand jury or lose his job was a violation of his rights under the Fifth Amendment.

In the *Gardner* case, Gardner, a police officer, was required to answer questions before the grand jury and sign a waiver of immunity. Upon his refusal, he was discharged and the discharge upheld by the United States Circuit Court of Appeals.

In the *Uniformed Sanitation* case, the Appellate Court

of New York held that the discharge of employees in the sanitation department was proper in view of their refusal to answer questions on the ground of self-incrimination and refusal to sign waiver of immunity.

This Honorable Court, in granting certiorari, at least indicated that the lower court decisions in the *Gardner* and *Uniformed Sanitation* cases will be reviewed. We suggest that these cases are some substantial authority for granting certiorari in the instant case.

In the *Uniformed Sanitation* case, the Commissioner of Sanitation had even obtained a court order authorizing him to tap certain telephone lines. No such thing exists in this case.

The Supreme Court has recently acted on an important matter involving Fifth Amendment rights, and the cases of *Marchetti v. United States,* 36 Law Week 4143, and *Grosso v. United States,* 36 Law Week 4150, were reversed. These cases involved the wagering act passed by Congress, requiring those who engaged in the business to apply for a license, pay wagering stamp tax and make periodic reports. This act was held unconstitutional, as compelling self-incrimination in violation of the Fifth Amendment. We contend that these are some authority for our position here, where Stafford was compelled to testify before the grand jury or lose his job, his substantial pension rights, and substantial amounts of money.

In making the points throughout, we have referred to the Reporter's Transcript and have given the pages thereof where the objections were made to the various evidence which we contend was improperly received, referring to authorities cited in the trial court and, of course, in the briefs to the Court of Appeal.

Petition for writ of certiorari, we respectfully pray, should

be granted, to the end that full justice may be done, that the judgments herein be reversed after a full and complete hearing before this Court.

Respectfully submitted,

RUSSELL E. PARSONS and
HARRY E. WEISS
For Petitioner Canard

RUSSELL E. PARSONS
For Petitioners Stafford, Myers and Miller
ARTHUR LEWIS, *Of Counsel.*

FOOTNOTE 1

[1]Peter Stafford, one of the petitioners herein, was a sergeant of the Los Angeles Police Department. Chief of Police William H. Parker testified that he knew Stafford; knew Stafford's reputation in the field of bookmaking; knew that Stafford was utilized for training purposes; and knew that Stafford was considered to know as much or more about bookmaking in the Los Angeles area than any other member of the department, and also as to sports activity. (R.T. p. 62) Stafford was the sergeant in charge of two bookmaking squads of four officers each. The vice squad enforces the laws with reference to gambling, bookmaking, prostitution, alcoholic beverage control violations and other similar type laws. Stafford's duties were to formulate enforcement programs, train his men, supervise their execution, supervise or make proper inquiry into arrests when they were presented, to approve arrests, to review the contents of arrest reports, and to approve their distribution. Stafford had asked to extend his stay on the vice squad; he did so because he was going to college, attempting to get a degree, and on this job he worked days and could go to school and study at night. Captain Gaunt and Inspector Collins had approved the extension of Stafford's tour of duty in Central Vice. (R.T. pp. 91-93) Captain Gaunt testified that he regarded Stafford as a skilled officer in the field of bookmaking. He relied upon Stafford and had confidence in him. He had examined the work of the Central Vice while Stafford was there and had found Stafford to be an outstanding man in his assignments. He had given an excellent rating to the squad's activities when Stafford was there. (R.T. pp. 95, 96) The number of arrests by that squad was considerably above the average for the city. In fact, on a monthly basis, the number of bookmaking arrests made by

Central Vice was the top number of arrests throughout the city. There were fifteen vice squads operating throughout the city. (R.T. pp. 98, 99) Stafford was one of the authors of Exhibit A, a booklet entitled "Operation Bookmaking." This book was used throughout the department; other officers were given the book to instruct by; and it was used in Central Division to indoctrinate new officers and to train uniformed officers. Stafford also lectured at the Police Academy to the trainees and other officers. (R.T. pp. 102-104) Exhibit B had been prepared by Stafford and was likewise used. Stafford was rated excellent.

We will not here repeat the evidence; however, in a few words: Stafford was the sergeant in charge of bookmaking at Central Vice; the number of Stafford's arrests was high, as has been shown. Stafford knew DeMaddalena. Officer Gunn worked with Officer DeMaddalena. Gunn stated that DeMaddalena gave him a $50 bill and told him to watch it, in effect, it was "a big one"; from time to time thereafter Gunn and DeMaddalena talked. According to Gunn, DeMaddalena told him that they were giving protection to some people, that they would get some money, they would be paid $200 once a month, and later DeMaddalena told him that Sgt. Stafford was part of the deal. Altogether, DeMaddalena said he had received some $400 or $450, most of which he gave to Gunn. The evidence showed that on or about the time DeMaddalena gave Gunn $200 (to which Gunn testified), DeMaddalena had borrowed $200 from the credit union. Gunn reported to his superiors and they set up a watch on DeMaddalena and apparently on Stafford. Hundreds of telephone calls were monitored, using police officers and equipment of the department.

The evidence shows that throughout the period DeMadda-

lena was talking to Gunn, who was attempting to make a case, DeMaddalena was drinking excessively—Gunn even reported this to his superiors.

An arrangement was made to have Gunn call Stafford and give Stafford a number, which Gunn did. The conversation was recorded. (Appendix "A" pp. 6, 7) Stafford testified that on receipt of Gunn's call he thought Gunn was double-talking in front of his superiors, that they wanted DeMaddalena and DeMaddalena was out drunk; and he (Stafford) had telephoned a bar frequented by DeMaddalena, attempting to locate DeMaddalena. (R.T. p. 2232) Ralph Dark, a bartender at the Lake Club, testified to having received a call from Stafford on the date in question. (R.T. p. 2557) Stafford denied having notified anybody that there were about to be any arrests. On this occasion, at one of the so-called "protected spots," when the officers arrived, the man at the location readily stated that he was not booking sports action, only horse action. No arrest was made; the man was there; he had not left the establishment; obviously, he had not been notified of an impending raid. This, we feel, negates any contention by the People that Stafford had notified somebody that spots might be searched or arrests made, and that Stafford did exactly as he said—attempted to cover for a fellow officer who he believed was on another drunken spree.

Of the hundreds of calls monitored, only two other calls of Stafford's were introduced in evidence. (See Appendix "A" pp. 8-10) These were introduced in an attempt to show that Stafford had made some inquiry about a police car purportedly seen in the vicinity of Canard's home. In the conduct of police business, Stafford no doubt checked on many automobile numbers. At pages 2255-2258, Stafford explains this call.

In the line of work Stafford was in, it should not be surprising that he was acquainted with known gamblers. He knew Canard. He never received a bribe or gratuity from Canard. To some extent Canard had been an informer for him. (R.T. p. 2179)

Stafford knew Miller. At one time Miller had a publication called the "Post and Paddock." Stafford had investigated Miller. Stafford knew Miller had a reputation of being a gambler. (R.T. p. 2187) Stafford testified that he bought produce at Miller's produce store, but he never received any money from Miller.

Stafford also knew Myers; he knew Myers had a dress shop and had heard rumors that Myers was a gambler. There was an occasion when DeMaddalena and Stafford met Myers and Adler in a well-known Pasadena restaurant (the Westward Ho)–Stafford says by chance and not by appointment. This was the first time Stafford had ever met Mr. Adler. The evidence shows that on this occasion DeMaddalena was drunk. Stafford testified that he never received any money from Myers or Adler.

On one occasion Stafford and DeMaddalena were observed conversing at a car wash in Arcadia. According to the Court of Appeal's opinion (p. 10), the next day DeMaddalena gave Gunn two $100 bills. As we have previously stated, on or about the time DeMaddalena gave Gunn $200, DeMaddalena had borrowed $200 from the credit union. Stafford denied that he ever gave DeMaddalena $200. (R.T. p. 2228) Regarding this incident, the owner of the car wash testified in Stafford's behalf (R.T. p. 2390)

On March 20, 1964, Stafford was arrested in the schoolyard and taken to the motel outside of the city of Los Angeles and treated in the degrading manner that we have already completely

and thoroughly covered. It was at this time that Stafford's notebooks were illegally seized—later becoming Exhibits 69 and 70 at the trial. These books contained hundreds of items of information. Certain numbers were selected from these books and an attempt made to correlate them with numbers in DeMaddalena's book, Exhibit 3. Certain investigations were made of these numbers and some arrests were made. Since we have already covered this phase completely in the petition itself, we will not repeat here what happened to this investigation of so-called "protected" numbers.

It was developed throughout the trial, by interrogation of the various police officers, that practically every police officer—particularly vice officers—keep numbers in a book and names of suspects and informants. Further, that they frequently and commonly give numbers to one another and exchange information. Often they get the same numbers from different informants. It would have been strange, indeed, not to have found the same or similar numbers in the books of different vice officers, and it would have been even stranger if the officers had selected numbers out of any policeman's book—including Stafford's—and made inquiries about them and had not found, in some instances at least, that there were lawbreakers present or that some rule of law was being violated. Stafford had no city-wide control; his duty was only over a very limited area. In fact, it was a rule, if they wanted to check a telephone number and get the address or the number at a certain address, they had to go through the Intelligence Division, which had city-wide jurisdiction. DeMaddalena did not testify to seeing Stafford get any money from anybody; nor did any other officer so testify or any witness in this trial so testify that they ever saw anybody give Stafford a dollar; nor did any officer,

except Officer DeMaddalena, say that he ever got any money from Stafford—except expense money which was properly distributed by Stafford in accordance with police regulations. The People's own witness, Safford, in describing bookmaking and the manner in which officers operate, stated that he usually maintained a book wherein he kept information such as the sources of information given to him with reference to bookmaking; that sometimes the information came from another officer, sometimes from another bookmaker, sometimes from an unknown source; and that all information is checked out. (R.T. pp. 156, 157) Further, that he had maintained books at all times wherein he kept such information, and that officers are required by department order to maintain a personal notebook at all times. (R.T. p. 158) Particularly was this true with a vice officer—that they in particular would have telephone numbers in their books and names of persons suspected of engaging in bookmaking and the names of informants and the names of purported bookmakers and their addresses and telephone numbers, telephone numbers where a bet might be made or a bet might be stiffed in. This was not at all unusual. (R.T. pp. 158-161)

On the night that Gunn was given the $50 bill, he and DeMaddalena had worked several bars and had had several drinks. (R.T. pp. 414, 415, 432) Even Gunn admitted that vice officers kept notebooks containing telephone numbers and addresses which would be of assistance in their work, and that from time to time they would discuss their notes with other vice officers. (R.T. p. 483) Gunn testified that sometimes he had such discussions with DeMaddalena. (R.T. p. 485) Even Gunn stated that a part of a vice officer's duties was to become friendly with bookmakers or suspected bookmakers;

that vice officers sometimes eat with bookmakers and drink with them when trying to get information; and that he had acquired information many times from informants. (R.T. pp. 542-544) Gunn testified that in the course of discussions with DeMaddalena, DeMaddalena named several officers in vice who purportedly had been receiving payoffs for years from Chinatown, including an officer on the night watch in Chinatown, and that this officer was still taking payoffs; and another officer DeMaddalena named was purportedly taking payoffs to permit gambling games in Chinatown. Further, Gunn testified that DeMaddalena told him it was unfortunate they were not working nights, as they could make a thousand a month if they did. (R.T. pp. 542-548) According to Gunn, DeMaddalena also told him that he was a personal friend of the captain and, by reason of that, they would work together as partners for a long time; that Stafford only had a few more months to go in his capacity in Central Vice. (R.T. p. 550)

All of the officers whom DeMaddalena accused—some of whom DeMaddalena said had received thousands of dollars—with the exception of one, were called as witnesses and they denied ever receiving any payoff money.

Gunn denied a conversation with one Henry Davis, a fellow officer, in which Gunn had informed Davis that DeMaddalena was a "lush." Davis testified that Gunn said in a conversation in the Hall of Justice that DeMaddalena was a "lush." Gunn admitted having seen DeMaddalena at the apartment of DeMaddalena's girlfriend when the girlfriend said to DeMaddalena, "You're drunk; why don't you tell the truth." (R.T. pp. 556-558) Gunn also testified that on one occasion he had gone to the Blue Front Bar with a policewoman

and had met DeMaddalena and other officers there and, while there, one of the officers told DeMaddalena to quit drinking and running around with women. (R.T. pp. 557-559) Gunn testified that on that particular night DeMaddalena was too drunk to drive. Gunn further testified that there were times when he covered for DeMaddalena when DeMaddalena did not come to work; that he told his captain on one occasion that DeMaddalena was on the ragged edge.

DeMaddalena finally wound up at the Edgemont Hospital under the care and treatment of Dr. Stuart C. Knox. Dr. Knox testified that his opinion was that it had taken close to ten years for DeMaddalena to reach the condition he was in, that DeMaddalena was a psycho-neurotic alcoholic and that DeMaddalena's brain was affected. (R.T. pp. 2539-2549)

The opinion of the Court of Appeal (Appendix "A" pp. 11, 12) sets forth a recorded conversation made by Officer Gunn to Mr. Adler on March 20, 1964. Mr. Adler's response to this call will be found at Reporter's Transcript p. 2388.

Following this, Officer Gunn made two calls to Mr. Myers (Appendix "A" pp. 12-17). Mr. Myers' testimony regarding these telephone calls will be found at Reporter's Transcript pp. 2903-2906.

With reference to Mr. Miller—a produce man—evidence was offered as to an incident which took place after any possible conspiracy had long since ended, where he went to a bank concerning a check that had been given for rent. This evidence was highly prejudicial and certainly not material, and it was incompetent because of its late date.

In closing may we state that it was the drunken declarations of DeMaddalena to Gunn upon which a large part of this case was based, and we contend that no conspiracy was established.

OPINION OF THE COURT BELOW

[Crim. No. 11448]

Court of Appeal of the State of California, Second Appellate District, Division Four. Filed December 26, 1967.

THE PEOPLE, Plaintiff and Respondent, v. EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER, Defendants and Appellants.

APPEALS from judgments of the Superior Court of Los Angeles County. Mark Brandler, Judge. Affirmed.

Judgments of conviction for conspiracy to commit bribery, to engage in bookmaking and to obstruct justice, affirmed.

Russell E. Parsons and Harry E. Weiss, for Defendants and Appellants Emmett Canard and Peter Stafford; Forno & Lewis and Joseph T. Forno, for Defendants and Appellants Cyril Myers and George Miller.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, Howard J. Bechefsky, Deputy Attorney General, for Plaintiff and Respondent.

In an indictment returned by the grand jury, Peter Stafford and Henry De Maddalena, Los Angeles police officers, together with Emmett Canard, Cyril Myers, George Miller and Maury Adler, were charged with conspiracy to offer and give bribes to

executive officers of the State of California (Pen. Code sec. 67), to ask for and receive bribes for officers, employees and appointees of the City of Los Angeles (Pen. Code sec. 68), to engage in bookmaking (Pen. Code sec. 337a), and to obstruct justice and the due administration of the laws pertaining to bookmaking and bribery (Pen. Code sec. 182 subd.5). Seven overt acts were charged, each alleged to have occurred during the period from February 15, 1964, through March 20, 1964. A jury found each defendant guilty, and returned a special verdict finding that the objects of the conspiracy were those charged in the indictment. Stafford, Canard, Myers and Miller appeal. Stafford's appeal is from the judgment sentencing him to state prison. The other defendants appeal from the order granting them probation (which is treated as a final judgment under Penal Code section 1237).

Generally speaking, defendants urge the same basic contentions. At the outset, to answer their challenge that the evidence is insufficient, we present a summary of the pertinent facts (viewing them as we must in the light most favorable to the People).

Defendants Stafford and De Maddalena were members of the Los Angeles Police Department. Stafford was supervising sergeant assigned to the bookmaking detail of the Central Vice Division. He was an acknowledged expert in bookmaking law enforcement. Late in 1963, upon the recommendation of Stafford, Officer De Maddalena was transferred to the Central Vice bookmaking detail to work under Stafford. On February 1, 1964, De Maddalena and Officer Joseph Gunn were assigned as partners to work the West Los Angeles area.

On February 15, Gunn and De Maddalena were on an

assignment at the Kismet Bar, when De Maddalena stated, "Here's some money for you." He handed Gunn a $50 bill and told him "It's for your New York vacation!", Gunn asked what he had to do for the money and De Maddalena said, "You won't have to do anything. You won't know anything about anything. All you have to do is get your money from me. This concerns something that is out of our district and we can go ahead and make our arrests every month and it won't be any concern to us."

After leaving De Maddalena, Gunn went directly to Lieutenant Wilson, the acting division commander, and told him what had transpired. At a meeting held on February 17, with Captain Nelson (the Administrative Vice-Commander) and Captain Mills (the Internal Affairs Commander) both in attendance, Gunn was instructed to go along with DeMaddalena in order to find out all the officers and criminal elements involved. He was to report what he found out to Captain Mills.

The next time Gunn saw De Maddalena was on February 18. De Maddalena told him he would be paid $200 once a month. On February 20, outside the Clown Town Bar, De Maddalena, then in a state of intoxication, showed Gunn the last page of his personal notebook. It contained letters and numerals. He told Gunn it was a code and represented the phone numbers for 17 "front and back offices" for Cyril Myers, the biggest sports bookmaker in Los Angeles.

"Front offices" and "back offices" are terms used to describe places where illegal bets are received and recorded by bookmakers. A front office is staffed by a clerk who takes bets phoned in by bettors and temporarily records them on objects which are quickly destructible. The back office is the place where the bets are thereafter permanently recorded,

usually on pads called betting markers. Periodically, the back office clerk telephones the front office clerk, and the latter relays the bets received and then destroys his record.

After showing Gunn his notebook, De Maddalena stated that Gunn's job would be to periodically check "the telephone board" at Administrative Vice.

When an Administrative Vice officer wants the address for a telephone number of a suspected bookmaking establishment, he writes the number on a clipboard referred to as "the telephone board." It is kept by an employee in the Administrative Section of the department. By calling the Intelligence Division (who would in turn contact the telephone company), the employee secures the address of the telephone for the investigating officer.

De Maddalena told Gunn that he should bring the telephone numbers he got off the telephone board to him to check against the numbers in his notebook. If they matched one of the numbers of Cyril Myers, he would warn him about the impending investigation.

On February 22, De Maddalena told Gunn that the payoff would be on the 15th of the month. He stated, on February 26, that Sergeant Stafford was part of the deal. The next day he said that Canard, of the Crown Hill organization at Third and Lucas Streets, and some other bookmakers were also involved.

On February 27, De Maddalena said he had to attend a meeting in Pasadena with Myers and that Stafford would probably be there. Two days later he told Gunn about having gone to the meeting. He said that Stafford, Myers and Maury Adler, who managed Myer's dress shop at Wilshire and Oxford, were at the meeting; Myers also agreed to pay them $200 a month. De Maddalena further stated that he had mentioned Guhn's name

at the meeting.

On March 4 De Maddalena told Gunn that five bookmakers, including Myers and Canard, were paying them off; Pete Stafford had only about four months to go in Central Vice; when he finished his tour of duty, he and Gunn would be the bosses of the operation; Stafford was picking up all the money and making all the payoffs; because Stafford had numerous ways "to cut the pot," he couldn't afford to give them more than $200 each; Stafford himself cleared about $700 or $800 a month.

On the same date, De Maddalena instructed Gunn to copy down certain telephone numbers. He gave Gunn 16 numbers. Some, he said to put under Crown Hill, including DU 9-0888. Some, he told Gunn to put under Cyril Myers name, including a back office number, PL 4-2261 and a front office number, RE 3-4745. Madison 6-4572 was to be put under the name George Miller. Gunn was also given Myers' and Stafford's home numbers and Adler's numbers at Myers' dress shop. De Maddalena said that, if any of the numbers came up and he was not around, Gunn was to call "Cy, Maury or Pete" and warn them. To identify himself when he called, he was instructed to say "this is Mr. Harris calling."

On March 9, De Maddalena told Gunn he was going to see George Miller; he would get some money from Miller for protecting a Barboudi game Miller was going to open up. On March 11, Gunn was told by De Maddalena that he planned to see Stafford on Sunday to pick up their money.

Gunn reported everything De Maddalena had told him to his superiors. On March 12, following a plan set up by them, Gunn went at 11:15 a.m. to Administrative Vice and picked up two phone numbers from Lt. Wilson. They were numbers for a back office and a front office listed to Cyril Myers. The front

office number was RE 3-4745. He immediately went down to the Internal Affairs Division and from there dialed Pete Stafford's telephone extension. The following conversation took place:

"Q Pete?

"A Yeah.

"Q This is Joe Gunn.

"A Yeah.

"Q Can you talk?

"A Yeah.

"Q All right. Look Hank's off today.

"A Yeah.

"Q And he sent me out on that stake-out this morning out in Beverly Hills on Oscar Stewart.

"A Yeah.

"Q And I just got back in the office a little while ago and Wilson is briefing Safford in there.

"A Yeah,

"Q And a couple other squads and they're going out to hit a back and a front right now; they're gone.

"A Yeah.

"Q They just left the office.

"A You don't know who it is or nothing?

"Q Yeah, I got the numbers. And it matches. The ones we got for Cy at the book.

"A Yeah.

"Q Hank gave me. Do you want them?

"A The one for who?

"Q For Cy.

"A Yeah. Okay.

"Q All right.
"A Okay. Fine. That's enough. Okay.
"Q Do you want the front?
"A Yeah, give me the front.
"Q Okay, the front was REpublic --
"A Yeah.
"Q -- 34745.
"A Yeah, okay, fine.
"Q Okay.
"A Thank you.
"Q You'll take care of it, then?
"A Thank you. Yeah."

At 11:21 a.m. Stafford was observed leaving the Central Vice office. He went to the lobby of the Police Building and entered a public telephone booth.

On the morning of March 12 Sergeant Safford (not to be confused with defendant Stafford) had been instructed by Lt. Wilson to place Apartment 9 at 12036 South Vermont Avenue under observation. Safford had received the phone number PL 4-2261 in connection with that address. At 11:45 a.m. he observed a man carrying a bundle leave the apartment.

The man was Wayne Galligan. He was operating a back office from that location. He had received a telephone call telling him to leave.

On March 13, De Maddalena drove with Gunn to Myers' dress shop. He told Gunn he was going inside to get Adler's new back office number. When he returned to the car, he stated that Adler had said they were not going to have a permanent back office number again until they found out where the leak was that resulted in the back office number getting out the day before. He said that Galligan, the clerk

at that back office, would temporarily operate a rotating back office, moving from location to location each day.

In February and March, Canard and a woman known as Michelle Parks were staying in Apartment 5, at 250 South Reno Street. The telephone number of their apartment was DU 9-0888. At 1 a.m. on March 13, pursuant to instructions from Lt. Wilson, Sergeant Safford went to the Reno Street apartment driving an undercover police car. It had been assigned to him since August 1963. The license number was NZK002. As he entered the hallway of the apartment building, he observed Michelle Parks. She approached the door of Apartment 5, turned and looked at him, and then entered the apartment. Safford left the building, circled the block on foot and then returned to his car. After driving a few blocks, he noticed a vehicle without lights following him. When it pulled over and parked, he turned and drove past it. Michelle Parks was standing near the car.

Later that same morning Stafford made the following telephone call from the office of Central Vice:

"FEMALE VOICE: Motor vehicles.

"MALE VOICE (Stafford): Nora Zebra King 002.

"FEMALE VOICE: Nora Zebra King 002.

"MALE VOICE: Uh-huh.

"FEMALE VOICE: Who is calling, please?

"MALE VOICE: Central Vice.

"FEMALE VOICE: One moment.

"MALE VOICE: Hey Mortell. Where's he at? Tell him to come back. We've got a lewd phone call deal here. Where's Crantford. Is Crantford in Court?

"FEMALE VOICE: Nora Zebra King 002.

"MALE VOICE: Yeah.

"FEMALE VOICE: I'm sorry. We've no record.

"MALE VOICE: Thank you.

"FEMALE VOICE: You're welcome."

Shortly thereafter Stafford placed another call, also from the same location. He talked with someone in the vehicle dispatcher's office:

"FIRST MALE VOICE: Dispatcher's office, Ramon.

"SECOND MALE VOICE: Yeah, Ramon. This is Stafford, Central Vice.

"FIRST MALE VOICE: Uh-huh.

"SECOND MALE VOICE: Say, I think I left a —— first of all, I think this is the car. Do you have a car that is Nora Zebra King 002, a green, blue Ford? I think that was the license number, but I can't remember.

"FIRST MALE VOICE: I don't know but —— was it a two-door and light green Ford, '59?

"SECOND MALE VOICE: No. It was a blue —— kind of a blue one. '60 Ford, I think it was.

"FIRST MALE VOICE: Did you come in today?

"SECOND MALE VOICE: No, the other day I had it out.

"FIRST MALE VOICE: Well, anyway, what are you looking for?

"SECOND MALE VOICE: I was looking for a notebook I had in there, that's all.

"FIRST MALE VOICE: Because I'm looking right here in the drawer and there's a brown zippered

notebook.

"SECOND MALE VOICE: No, that's not it.

"FIRST MALE VOICE: And let's see what else is in here.

"SECOND MALE VOICE: O.K. Maybe it's not there then.

"FIRST MALE VOICE: There's a little booklet.

"SECOND MALE VOICE: You don't have the cars according to license number anyhow, do you?

"FIRST MALE VOICE: No, not by license number.

"SECOND MALE VOICE: O.K. Thank you.

"FIRST MALE VOICE: But most cars are in here today, so ——

"SECOND MALE VOICE: Yeah, well, I'll take a look after a while.

"FIRST MALE VOICE: O.K."

On March 15, Stafford and De Maddalena were observed conversing at a car wash in De Maddalena's car. The next day De Maddalena gave Gunn two $100 bills.

Pursuant to instructions from their superiors, on March 20 at 8:30 a.m., Lt. Hill, Sergeant Judd and two other officers, approached defendant Stafford after he dropped his son off at school. He was driving a police vehicle. He was told he was assigned to Lt. Hill for the day; that he was the subject of an investigation. They picked up his notebooks, which were lying on the seat of the car, and drove him to a motel where he was searched and then held incommunicado for the next few hours.

At 10 a.m. Lt. Wilson sent 75 policemen out to the

vicinity of the suspected front and back offices, the addresses of which their investigation had uncovered. Those sent to the back offices were instructed that, after receiving a radio signal at about 11:30 a.m., they were to arrest anyone who left the locations. The officers going to the front offices were told to attempt to "stiff-in" (to place) a wager over the telephone.

The officers arrested Canard as he left Apartment 5 at the Reno Street apartment building. They found bookmaking "owe sheets," marker pads and two adding machines in the apartment. The phone number there – DU 9-0888 – was in Stafford's notebook under Canard's name. It was also in De Maddalena's notebook.

In all, the investigation undertaken that day revealed evidence of bookmaking at 10 locations the telephone numbers of which both De Maddalena and Stafford had in their notebooks. At one front office the officers were able to "stiff-in" a bet.

While the field investigation of March 20 was still in progress, Captain Mills instructed Officer Gunn to call Myers and Adler and, using the Harris code, indicate to them their back office would be hit. At 11:30 a.m. Gunn called Adler at Cyril's dress shop. The following conversation took place:

"FEMALE VOICE: Good morning, Cyril's.

"Q May I please speak to Mr. Adler?

"FEMALE VOICE: Mr. Adler? Hold the line, please.

"A Hello.

"Q Mr. Adler?

"A Yes.

"Q This is Mr. Harris calling.

"A Yes, sir.

"Q Look, I can't get ahold of Pete.

"A Yes.

"Q And I can't get ahold of Cy, the line's busy out at the shop.

"A Yes.

"Q And a couple of guys just left the office and they're talking about hitting a back.

"A A who?

"Q They're talking about hitting a back office.

"A Yes.

"Q And the only name I got was Galligan. They're talking about a guy named Galligan. That's supposed to be a clerk on it.

"A Yes.

"Q So I tried to get ahold of Pete. I don't know where the hell he is. He's out in the field somewhere. And Hank, he's in court today. I don't know where the hell he is. So will you take care of it?

"A Yes.

"Q Okay.

"A Okay."

Gunn then called Cyril Myers and had this conversation:

"Q May I speak to Mr. Myers, please?

"FEMALE VOICE: One second.

"A Hello.

"Q Mr. Myers?

"A Yes.

"Q This is Mr. Harris calling.

"A Yes, Mr. Harris.

"Q Look, I can't get ahold of Maury at the

shop.

"A Yeah.

"Q The line's busy there and Pete's out in court.

"A Yeah.

"Q And a team just left the office just now.

"A Yeah.

"Q And they were talking about hitting a back office, and they mentioned the name Galligan. Now, I notice that is the guy from the last time, right?

"A Yeah.

"Q All right. So you take care of everything?

"A Yeah. He told me he was taking a hike and he was gone all day, and I told him not to go near the place.

"Q What did he say?

"A He spotted someone following him this morning.

"Q He spotted someone following him this morning?

"A Yeah. I told him not to go near the place.

"Q Why, is he at it now?

"A Huh?

"Q Is he at the place now?

"A No, no.

"Q There's nobody in the back now?

"A I don't think so, no, sir. I'll try right away. I don't even know the number, but I'll try it.

"Q All right. Well, look, if you're held up, do you want me to give it a try.

"A I don't even know the number.

"Q Oh, well, you know where it is?

"A No.

"Q Jesus, that's -- how we going to get ahold of him?

"A I don't know. Maury's not at the office, huh?

"Q The line's busy, it's been tied up. I can't get ahold of Maury.

"A Let me see if I can reach him right now.

"Q All right. You're going to try to reach Maury right now?

"A I'll keep on it right now.

"Q You want me to call you right back here?

"A Could you, please?

"Q Yeah, I'll call you back in a few minutes, okay, Cy?

"A You bet.

"Q Okay. Goodbye."

Shortly thereafter Gunn again called Myers:

"FEMALE VOICE: Hello.

"Q Mr. Myers, please.

"FEMALE VOICE: One second.

"A Hello.

"Q This is Mr. Harris.

"A Yeah, Mr. Harris, I reached him. He said he's been trying to get -- he got messages to all the fronts.

"Q He got messages to all the fronts?

"A Yeah.

"Q All right.

"A And I told him a -- left messages * * * with him, but he's not in the back.

"Q He's not in the back.

"A No.

"Q Well, good, Goddamn, see, because, you know, I haven't seen Hank today, you know, De Maddalena?

"A Yeah.

"Q Because he's been in court. And I came right into the office today, so I didn't know whether he had this or not.

"A No, he --

"Q You know, whether he had called you or not.

"A But he called me this morning. He said he knew he was getting tailed. So I says, 'Well, don't go near the place. Just stay away, don't do nothing. Put a line in if you can; if you can't, forget it.'

"Q Well, how the hell did Maury know?

"A Did you call Maury?

"Q No, I haven't called him.

"A Maury said he talked to you.

"Q Not to me. I've been trying to get him and the damn phone's been busy down there.

"A He told me he talked to you 20 minutes ago.

"Q Not me, no, sir.

"A What the hell is this.

"Q Well, that's what I want to know. See, I haven't seen De Maddalena and wanted to know maybe he called or something.

"A He wouldn't use the Harris, would he?

"Q Who, De Maddalena?

"A Yeah.

"Q Well, hell, I think so, wouldn't he? Well, do you think -- do you think one of the other boys called?

"A I wouldn't know who.

"Q Well, I know it's not Pete, because I can't get ahold of Pete. And I thought it was De Maddalena; either him or Shoopman or Burke, or one of those, you know.

"A Burke? He was trying to hang me.

"Q Burke was trying to hang you?

"A I imagine.

"Q Why is that?

"A Well, he doesn't like me, I don't think, very well.

"Q Well, do you think Shoopman could have called Maury?

"A I don't know him.

"Q Well, shit, I don't --

"A I don't know.

"Q Well, who else has this -- who else has the bit?

"A I only know this Pat and this Harris. The only people I ever knew.

"Q Just Hank and Pete, and that's it?

"A And only Hank.

"Q Well, Stafford, I mean.

"A No, I don't know him.

"Q Well, Goddamn. I wonder who called

Maury. Well, either way, it turned out all right, so —

"A I hope so.

"Q — we'll worry about that later. Well, all right. As long as you got ahold of him, Cy, everything's o.k. then.

"A All right, boy.

"Q O.K. I'll see you, huh?

"A All right.

"Q Goodbye."

De Maddalena testified that, shortly after he transferred to Central Vice, Stafford gave him $100, saying "this is from some people that are taking care of us." Tommy Canard's name was mentioned. When he went to Administrative Vice in January 1964, Stafford told him he would be paid for protecting Canard, Cyril Myers and others, by watching the Administrative Vice telephone board. Stafford gave him the numbers to be protected and he put them on the last page of his notebook. He received $200 from Stafford for performing this service. The $50 he gave to Gunn was given to him by Stafford with specific instructions to give it to Gunn. In February 1964, he met with Stafford, Myers and Adler at the Westward Ho Restaurant in Pasadena. At this meeting they agreed to use "Mr. Harris" as a code name. Gunn was given the $200 for "going along with the play." He received the money from Stafford at an Arcadia car wash. In February or March, Stafford told him that George Miller was opening a gambling operation in the downtown area and would also pay for information.

One of the front offices hit by the police on March 20 was the Nelson Jewelry Company, located in Room 1106 at 215 West Fifth Street. Patricia Locricchio was taking and

recording bets from that location. Their phone number appeared in Stafford's and De Maddalena's books. In February and March the rent for Room 1106 was paid by a check drawn on the Guardian Bank. Ann Lieber, an employee of the landlord of Room 1106, received the check. She put the number 1106 in one corner and deposited it. On April 20 defendant Miller went to the Guardian Bank and asked to see the check, giving the date, drawer and its amount. He said he wanted to see it for a friend named Don. A secretary handed him the check and then turned to take a telephone call. When she came back to Miller, she saw that the check had been written over and the number 1106 had been erased. Miller said "the handwriting wouldn't be the same on this one as it was on this —— on this now as it was in its original form."

Stafford testified, denying any involvement in the conspiracy alleged. As part of his job, it was his practice to keep the phone numbers of suspected bookmakers in his notebook. Many of the numbers were supplied to him by informers. He and De Maddalena met Adler and Myers simply by chance at the Westward Ho Restaurant in February 1964, and were invited to dinner by them. They did not discuss bookmaking. He was acquainted with Myers before that time and knew he was a gambler. On March 16, when he was at the car wash, he and De Maddalena were discussing De Maddalena's family and health problems. He did not give De Maddalena any money nor did he receive any money from any of the other co-defendants.

Stafford remembered receiving the telephone call from Gunn on March 12. At the time he thought Gunn wanted to get hold of De Maddalena but that he was double talking because he was talking in front of a superior. He thought the

phone number mentioned by Gunn was where Gunn thought De Maddalena might be reached. He went to a phone booth to call the Lake Club which De Maddalena frequented. He used the public phone because personal calls are not permitted from the office. He talked with Ralph Dark who said De Maddalena was not there.

Stafford further testified that on March 13 he found a mug book with a note attached, "Possibly came out of NZK 002, a 1962 blue Ford." He did not know where it belonged so he tried Motor Vehicles. When he later called the motor pool to inquire about a car he had used a few days earlier, he gave the above license number by mistake.

In his testimony Stafford stated that he knew Miller. He was reputed to be a gambler. He sometimes got information from him. Miller had once published "Post and Paddock" which contained tips on the races. He also knew Canard, who was a bartender and small time gambler. Canard also gave him information.

Of the notation "Phone Cy" found in his notebook, Stafford testified that the Cy referred to an informer named Cyzeck. His notebook entry "make meet with Cy, Maury, Hank" referred to Gordon Jones (the Cy being G.J.) Maury Rissman and Officer Hank Weldon.

Adler testified, acknowledging that he and Myers had dinner at the Westward Ho with Stafford and De Maddalena. According to Adler they met by chance and did not discuss gambling. He knew his employer Myers was a gambler. Concerning the March 20th telephone call he had received, Adler stated that he did not understand what the caller was talking about, "so he just listened" attempting to recognize the voice. There were two offices over the dress shop. One was referred

to as a back office. It had no connection however with bookmaking. He thought the caller might be a robber. He had been a robbery victim twice in the past.

In his testimony Myers stated that, when he received the call on March 20, he was suspicious and just tried to keep the person talking.

Miller testified that he knew plenty of bookmakers. He gave Stafford the numbers of several of them to keep him from bothering the customers at his fruit company. He had no connection with Room 1106 at 215 West 5th Street. He had gone to the Guardian Bank on April 20 to do a favor for a friend named Dominic, a reputed bookmaker, who told him he bought a money order there and wanted it back. When the woman at the bank refused to let him have it, he did a "foolish thing," writing over it. He did not, however, erase the number "1106" on the check.

Canard did not testify.

The evidence above summarized is amply sufficient to support the finding of the existence of the conspiracy charged. A conspiracy may be established by circumstantial evidence. (*People v. Steccone,* 36 Cal.2d 234, 237-238; *People v. Salani,* 218 Cal.App.2d 835, 839.) It is not necessary for the People to show that the defendants actually met and agreed together to perform the unlawful acts. (*People v. Steccone, supra,* p. 238.) From their acts and conduct in mutually carrying out the common illegal purpose, the existence of the conspiracy may be inferred. (*People v. Danielson,* 203 Cal.App.2d 498, 505.) The circumstances here clearly indicate the existence of and the carrying out of a scheme to give protection to certain bookmakers through the bribery of police officers. The involvement of each appealing defendant in the conspiracy

was plainly shown.

Defendants point out that the testimony of De Maddalena was that of an accomplice which required corroboration. (Pen. Code sec. 1111.) However, the corroborative evidence necessary to connect individual defendants to the crime charged need only be slight; and may be evidence that, standing alone, would be entitled to but little consideration. (*People v. Wayne*, 41 Cal.2d 814, 822; *People v. Hensling*, 205 Cal.App.2d 34, 42.) De Maddalena's testimony that Stafford was a part of the conspiracy, was corroborated by the evidence of the clearly incriminating March 12 telephone conversation between Stafford and Gunn. The testimony of De Maddalena connecting Canard was corroborated by the finding of his phone number in Stafford's notebook and by the fact his residence contained evidence of bookmaking. Miller's defacing of the rent check for the front office located in Room 1106, and the fact his phone number was also in Stafford's book, corroborated De Maddalena's testimony regarding him. Finally, the testimony of De Maddalena concerning Myers was corroborated by the latter's admissions in the March 20 telephone conversation with Gunn. Gunn's testimony did not require corroboration. A feigned accomplice is not an accomplice whose testimony must be corroborated. (*People v. Hensling, supra*, 205 Cal.App.2d 34, 40.)

Defendants complain that the trial court unduly restricted the testimony of an expert witness called by the defense. A psychiatrist was permitted to testify that he examined De Maddalena and concluded that alcoholism had impaired his memory. The court would not, however, permit the witness to be asked whether, in his opinion, De Maddalena's testimony could be believed. The court's ruling was proper. The credibility of the witness was a question solely for the jury. (Code Civ. Proc.

sec. 2061 [now Evidence Code sec. 312(b)].)

Defendants contend that Stafford's and Canard's notebooks were the fruits of illegal searches and seizures and therefore were improperly admitted.

Stafford's notebooks were seized by his fellow officers when he was taken into custody on March 20th. They were observed lying on the seat of his assigned police vehicle. From what was revealed by the investigation of Stafford and his suspected co-conspirators at the time he was picked up (see the above summary of the facts), there was clearly reasonable or probable cause for his arrest for the conspiracy offense with which he was subsequently charged. The notebooks were properly seized as evidence of the crime. (*People v. Thayer*, 63 Cal.2d 635.)

Canard was arrested during the March 20th field investigation as he was leaving his Reno Street apartment. The investigating officers had been advised to arrest anyone emerging from that apartment after they received the appointed 11:30 a.m. radio signal. At the time of the arrest, Canard and the apartment were searched. The search of the apartment revealed evidence of bookmaking. The notebook in question was found in Canard's pocket. As was the case with Stafford, the information which had been obtained prior to March 20 indicated circumstances sufficient to support the conclusion that probable cause existed for Canard's arrest. The search and the seizure of the notebook were a reasonable incident to that arrest.

During the progress of the trial, defendants moved for a mistrial on the ground that unfavorable publicity in the local press and on television news prejudiced their chances for a fair trial. The court denied defense requests to poll the

jury to determine whether they had read or heard the news reports, and denied their motions for a mistrial. Defendants assign this as error.

The publicity referred to consisted mostly of substantially accurate reporting by the news media during the trial of the evidence as it was presented. There were two notable exceptions: On April 20, 1965, the prosecution's star witness, Officer Gunn, testified that in a conversation with De Maddalena which concerned the latter's plan to take over the operation when Stafford left Central Vice, he had asked De Maddalena if he was afraid of Stafford. De Maddalena had indicated he thought he could handle Stafford, although he was known as a "mean guy" who had "access to muscle" and who had set up several individuals in the past for a "working over"; that one of these individuals, a bookmaker named Lipowitz, had been set up by Stafford "for a working over with a baseball bat." This testimony was elicited without objection. After it had been received, a motion to strike was denied. However, later in the trial – on May 3, 1965 – the court granted defense motions to strike it.

On April 23rd the Los Angeles Herald-Examiner printed a story concerning the statement that Stafford had Lipowitz beaten up with a baseball bat. In the story, details of that beating and another one Lipowitz allegedly received were reported. The details were never brought out at the trial.

On the 5 p.m. and 11 p.m. KABC-TV Baxter Ward news programs of the same date, Mrs. Lipowitz was interviewed. She was questioned concerning her husband's having been "worked over." She stated that she had gone to the trial to see Stafford, because she "wanted to see what a man looked like, an officer of the law, that could do such a thing as that." She further stated that putting Stafford in prison for the rest of his life

could not adequately punish him for what he had done to her husband; that the testimony of his fellow officers indicated Stafford had had her husband beaten up.

Throughout the trial the court repeatedly, and in clear and unequivocal language, admonished the jurors that they were not to form any opinion on the case until it was submitted to them; that they were not to read any reports of the case in the newspapers, or to listen to or watch any reports of it on radio or TV. In its formal instructions, the court told the jurors that in deciding the case they were to be governed solely by the evidence introduced at the trial and the law as stated by the court.

The trial judge, in denying the motions for mistrial and to poll the jury concerning the news reports, concluded that the publicity was not conceivably prejudicial; that he was satisfied with the integrity and intelligence of the jurors and had to assume they abided by his repeated admonitions; that he would not have the jury polled because he neither wished to arouse their curiosity nor to embarrass them.

Absolutely no evidence was presented that any pre-trial publicity could have affected the selection of an impartial jury. This case bears no resemblance to *Sheppard v. Maxwell*, 384 U.S. 333, relied on by defendants, where, during the six or seven months preceding the trial, there was "a barrage" of newspaper headlines, articles and other news reporting slanted against defendant and creating a "wave of public passion" against him.

Neither was there any evidence here of prosecutorial miscondut, or indicating any laxity by the trial judge or defense counsel in the performance of their respective duties. Presumably, the jury followed the court's instructions, and

heeded the admonitions not to look at news reports of the case. (See *People v. Gomez*, 41 Cal.2d 150, 161-162.) Under the circumstances we cannot say the trial judge erred in concluding defendants were in no way prejudiced. Nor can we say the judge abused his discretion in not permitting a polling of the jury on the question.

Defendants complain about the use at the trial of recorded conversations secured by the police through the monitoring of police department telephones. In particular, Stafford contends that the tape recording and transcript of his March 12 telephone conversation with Officer Gunn, and of his March 13 conversations with the police dispatcher and the Department of Motor Vehicles, were inadmissible because the monitoring violated both state and federal law.

When word reached the Chief of Police that an investigation had uncovered evidence that members of Central Vice were involved in a criminal conspiracy and were utilizing Central Vice telephones for their criminal activities, he ordered telephone extensions installed in the Internal Affairs Division in order to monitor calls from the city telephones in Central Vice. The telephones involved went through the city hall switchboard. They were maintained by the city exclusively for the conducting of police business. The use of them was at all times subject to the orders of the Chief of Police. Members of the department, including Stafford, were aware how the phones were to be used. Private telephones were located in Central Vice which employees could use for personal matters.

The monitoring of the calls was not illegal. State and federal law prohibits only the "unauthorized" interception of telephone communications. (47 U.S.C. sec. 605;[1] Pen. Code

1 Section 605 of the Federal Communications Act provides a rule of

sec. 640.) The state statute forbidding eavesdropping or recording conversations (Pen. Code sec. 653j) applies only to "confidential" communications, which it defines (in subd. c) as including "any communication carried on in such circumstances as may reasonably indicate that the parties to such communication desire it to be confined to such parties," but excluding the communication made under circumstances "in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

As indicated above, the telephones monitored in this case were city telephones used only for police business. Clearly, the Chief of Police, as the person supervising and controlling the use of the phones, was a person authorized to monitor them. Any call properly made on those telephones was the business of the Chief of Police, and hence not confidential as to him or those authorized by him to hear it. It is common knowledge that special security precautions must be taken in police departments; those using the lines could reasonably expect that it could take the form of monitoring calls.

The recording and use of the telephone conversations between Officer Gunn and several of the defendants (including the March 12 conversation with Stafford) would not have been unlawful even if made from a private telephone. As one of the participants to the conversation, Gunn's consent to the recording of the calls was all that was necessary. The laws on eavesdropping and the recording of telephone communications do not apply where one of the parties to the conversation consents to or directs its overhearing or recording. (*People v. Fontaine*,

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evidence for federal courts. It does not apply to proceedings in state courts. (Schwartz v. Texas, 344 U.S. 199; People v. Sica, 112 Cal.App.2d 574, 585-586. [Cert. den. 346 U.S. 831].)

237 Cal.App.2d 320, 331; *People v. McShann*, 177 Cal.App.2d 195, 200.)

Defendants predicate error on the trial court's denial of their request to introduce evidence concerning the ultimate dispositions of the various cases in which arrests were made for bookmaking during the March 20th raids. The court correctly ruled against allowing in such evidence. The results of the investigation were admitted to show the nature of the places the telephone numbers of which Stafford and De Maddalena had in their notebooks. Whether the occupants of those places were subsequently tried and convicted of bookmaking (or were acquitted, or had their cases dismissed), depended on such extraneous factors as the technical rules of evidence or whether guilt was proven beyond a reasonable doubt, matters having no relevancy to the issues of this case.

Defendants suggest (now for the first time) that the jury should have been required to make individual findings as to the guilt of each of them of each charged object of the conspiracy. They argue that the possibility existed the jury arrived at inconsistent verdicts. No such result could have occurred. The jury was instructed:

> "In order to find the defendants or *any of them* guilty, you must unanimously find that *such defendant* or defendants unlawfully conspired to violate Section 67 P.C., or unanimously find that *such defendant* or defendants unlawfully conspired to violate Section 68 P.C., or unanimously find that *such defendant* or defendants unlawfully conspired to violate Section 337a P.C., or unanimously find that *such defendant* or defendants unlawfully conspired to violate Section 182, subdivision 5 P.C."

[Italics added.]

The jury found defendants guilty as charged and that the objects of the conspiracy were those charged in the indictment. The jury thus found each defendant had conspired to effect each of the alleged objects of the conspiracy.

The prosecution, in its cross-examination of Stafford, was permitted to refer on occasion to his testimony given before the grand jury. The evidence establishes that defendant was told before he appeared before the grand jury, pursuant to subpoena, that if he refused to testify by invoking the Fifth Amendment, it meant dismissal from the force. Defendant testified, on redirect examination, that he knew, if he refused to testify, he would be fired. When the prosecutor sought to impeach him through the use of his grand jury testimony, the defense objected that the testimony was involuntary, being the product of coercion.

In *Garrity v. New Jersey* (1967) ___ U.S. ___, 17 L.ed 2d 562, decided during the pendency of this appeal, the Supreme Court held that (at p. ___), ". . . the protection of the individual under the Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." The defendants in *Garrity* were police officers who, before being questioned about an investigation concerning the fixing of traffic tickets, were told that anything they said could be used against them in state criminal proceedings; that they had the privilege to refuse to answer if the disclosure would tend to incriminate them; but that if they did refuse to answer they would be subject to being removed from office.

The same principles which operate to exclude involuntary confessions of an accused, also require exclusion of involuntary admissions where sought to be used as affirmative evidence of guilt. (*People v. Atchley*, 53 Cal.2d 160, 169-170.) It is further established that an accused's involuntary confessions may not be used to impeach him. (*People v. Underwood*, 61 Cal.2d 113, 120-121.) This being so, the court in *Underwood* concluded (at pp. 120-121), " . . . a similar rule should operate to exclude involuntary *admissions* when they are offered for that purpose . . . [Citations.]" Any prior inconsistent statement of the accused relative to the offense charged, constitutes an admission within the meaning of the principles regarding admissibility of involuntary statements, where used to impeach his credibility. (*People v. Atchley, supra*, 53 Cal.2d 160, 170; *People v. Underwood, supra*, 61 Cal.2d 113, 121-122.)

The prosecution sought in the following instances to impeach Stafford using his grand jury testimony:

Stafford testified that on March 13th he found two notebooks in the office while he was cleaning a file cabinet. One of the books had the note attached "Possibly came out of NZK 002, a 1962 blue Ford." He wrote the number in his notebook and called the Department of Motor Vehicles to attempt to locate where the notebooks belonged. He had lost a notebook himself and the next day he called the motor pool and inadvertently gave that number as the number of the car he had used. "And what happened, I just made a mistake, and since I had this number on my mind, I ran NZK 002 instead of the number that I had out." On cross-examination defendant was asked when it was he first recalled that he had mistakenly associated the number NZK 002 with the loss of his own notebook. He testified that it was after he had

testified before the grand jury. He was then asked whether at the grand jury hearing he was questioned about the number. Defendant indicated that he had been asked about it; that at the time he testified before the grand jury he did not recall his mistake.

Stafford testified on cross-examination that he knew his codefendant Canard to be a part-time bartender and gambler. The prosecutor, attempting to establish that Stafford knew Canard to be a bookmaker, referred to the fact phone numbers of bookmaking establishments appeared next to Canard's name in Stafford's notebook. Stafford testified that he placed them there because he "had to associate them with somebody" and he knew Canard hung around those locations. Stafford was then asked to read certain testimony he gave before the grand jury. He was then asked whether he believed these were Canard's places. The grand jury testimony referred to was never read into the record. Stafford testified that he had stated before the grand jury that the places may have belonged to Canard. He then indicated that it was rumored that Canard was engaged in bookmaking at those spots.

The prosecutor asked Stafford about his relationship with Cyril Myers. Stafford testified he knew Myers as a gambler and heard he had laoned a bookmaker money for a bookmaking operation. It was then brought out that before the grand jury Stafford had testified that Myers "was the money behind" some bookmaking. The defense objected that the grand jury testimony was not impeaching evidence; that there was nothing inconsistent about the former testimony.

Finally, STafford was questioned about the entry in his notebook "make meet with Cy, Maury, Hank." Defendant testified it referred to Gordon Jones, Hank Weldon and Maury

Rissman. He stated that there was no arrangement to meet Myers and Adler at the Westward Ho Restaurant. He was then referred to his grand jury testimony. His former testimony was that he did not recall what the notation meant or to whom it referred; he could not remember whether the "Maury" referred to Maury Adler; there had been no prior arrangement to meet Myers, Adler or De Maddalena at the Westward Ho. At this point the defense again objected this was not impeachment; that it was Stafford's testimony almost word for word.

The jury was admonished that this line of questioning was admissible solely on the issue of Stafford's credibility as a witness.

Manifestly, the use of the grand jury testimony had little, if any, impeaching effect (as the defense was quick to point out at the time the prosecution sought to employ it). If *Garrity, supra,* applies, retroactively, to this case, the trial court was in error in permitting the prosecution to use Stafford's grand jury testimony in impeaching him. Whether or not that decision will be so applied has not yet been decided by the Supreme Court of this state. We need not decide it here, since, assuming that error was committed, it was not prejudicial. Beyond a reasonable doubt, the error in permitting the use of the grand jury testimony could not have prejudiced Stafford. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The judgments are affirmed.

Jefferson, J.

Files, P.J., and Kingsley, J., concurred.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on April , 1968, I served the within PETITION FOR WRIT OF CERTIORARI (EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER v. STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
217 West First Street
Los Angeles, California 90012

County Clerk, County of Los Angeles
111 North Hill Street
Los Angeles, California 90012
For: Honorable Mark Brandler, Judge

Attorney General, State of California
600 State Building
Los Angeles, California 90012

District Attorney, County of Los Angeles
600 Hall of Justice
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April , 1968, at Los Angeles, California.

_____

SUBSCRIBED AND SWORN TO BEFORE ME
THIS DAY OF APRIL, 1968,

_____

NOTARY PUBLIC IN AND FOR THE
STATE OF CALIFORNIA.

DEAN-STANDEFER, 215 W. 5th St., Los Angeles 90013

SUPREME COURT, U. S.

FILED
SEP 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968
No. 80

EMMETT CANARAD, CYRIL MYERS, PETER STAFFORD, and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

THOMAS C. LYNCH,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
RONALD M. GEORGE,
Deputy Attorney General,
600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term 1968
No. 80

EMMETT CANARAD, CYRIL MYERS, PETER STAFFORD, and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

Preliminary Statement

Petitioners seek a writ of certiorari from this Court to the California Court of Appeal, Second Appellate District, Division Four, to review its decision affirming judgments of conviction of conspiracy. The opinion of the Court of Appeal, filed December 26, 1967, is reported at 257 A.C.A. 500 (1967) [65 Cal. Rptr. 15] (hearing denied by the California Supreme Court). The Petition for Writ of Certiorari was docketed on May 9, 1968. This Brief in Opposition is filed pursuant to the Court's request contained in its letter of August 12, 1968.

Jurisdiction

Jurisdiction in the present Petition for Writ of Certiorari is invoked presumably pursuant to Title 28, United States Code, section 1257(3).

Questions Presented

By letter dated August 12, 1968, the Court requested this Brief in Opposition without specifying any particular issue. The following issues are raised by the Petition:

1. Did the trial court err in permitting cross-examination of petitioner Peter Stafford, a police officer, as to testimony given by him, allegedly under compulsion, before the Grand Jury?

2. Was petitioner Stafford denied the right to a fair trial and due process of law, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, by reason of his detention, the allegedly unlawful search of his person, and the use of the fruits of such search at the trial?

3. Did the trial court err in denying a mistrial sought on the basis of unfavorable newspaper and television publicity during the pendency of the trial?

4. Did the interception of telephone conversations made by petitioner Stafford and a co-defendant, and the use in evidence of recordings of the conversations, violate the Fourth, Fifth, and Sixth Amendments to the United States Constitution and the Federal Communications Act?

5. Was the evidence insufficient to sustain the judgments of guilty as to any of the petitioners?

6. Did the trial court err in excluding evidence as to the disposition of the cases in which bookmaking arrests were made during the investigation in question?

Statement of the Case

In an indictment and an amended indictment filed by the Grand Jury of Los Angeles County, petitioner Peter E. Stafford and Henry DeMaddalena, Los Angeles Police Department officers, and Emmett Canard, Cyril Myers, George Miller, and Maury Adler were charged in Count I with the felony of conspiracy to offer and give bribes to executive officers of the State of California in violation of California Penal Code section 67, to ask for and receive bribes for officers, employees, and appointees of the City of Los Angeles in violation of California Penal Code section 68, to engage in bookmaking in violation of California Penal Code section 337a, and to obstruct justice and the due administration of the laws pertaining to bookmaking and bribery in violation of California Penal Code section 182.5. Seven overt acts were alleged. (Clerk's Transcript [hereinafter referred to as Cl. Tr.] pp. 1-2, 6-7.)

In Counts II and III, Henry De Maddalena was charged with the felony of offering and giving a bribe to an executive officer of the State of California, Joseph Gunn, a Los Angeles Police Department officer, with the intent to influence Gunn's actions in the performance of his duties as a member of the Los Angeles Police Department, in violation of California Penal Code section 67. (Cl. Tr. pp. 3-4, 8-9.)

The motions of each defendant pursuant to California Penal Code section 995 to set aside the indictment

were denied, and the defendants pleaded "Not Guilty." (Cl. Tr. p. 17.) Petitioner Stafford's motion to suppress evidence was denied (Cl. Tr. p. 42), and motions for mistrial were denied. (Cl. Tr. pp. 51, 57.)

After a jury trial petitioners were found guilty as charged, and the jury returned a special verdict finding that the objects of the conspiracy were those charged in the indictment. (Cl. Tr. pp. 142-43.) Motions for new trial were made by petitioners and were denied by the trial court. (Cl. Tr. pp. 193-97.)

As to petitioner Stafford, probation was denied and he was sentenced to state prison for the term prescribed by law, which is one to fourteen years. (*See* Cal. Pen. Code §§ 67, 68, 182.) (Cl. Tr. p. 203.) As to petitioner Canard, proceedings were suspended and probation was granted for five years on condition that he spend ninety days in county jail and pay a fine of $1,000 plus penalty assessment. (Cl. Tr. p. 202.) As to petitioner Myers, proceedings were suspended and probation was granted for five years on condition that he spend six months in county jail and pay a fine of $5,000 plus penalty assessment. (Cl. Tr. p. 201.) As to petitioner Miller, proceedings were suspended and probation was granted for five years on condition that he spend sixty days in county jail and pay a fine of $2,500 plus penalty assessment. (Cl. Tr. p. 199.)

Petitioners filed timely notices of appeal. (Cl. Tr. pp. 204, 206-07, 210.) As to each, bail on appeal was set and stay of execution of the judgment was granted pending appeal. (Cl. Tr. pp. 199, 201-03.) Their convictions were affirmed by the Court of Appeal. *People v. Canard*, 257 A.C.A. 500 (1967) [65 Cal. Rptr. 15].

Timely petition for hearing in the California Supreme Court was filed and was denied on February 19, 1968. 68 A.C. #8, Minutes, p. 3. A petition to recall the remittitur was denied by the Court of Appeal. Petitioners' applications to recall the remittitur and to stay execution of judgment were denied by the California Supreme Court on May 6, 1968. The trial court, the Superior Court of California in and for the County of Los Angeles, has granted a stay of execution to permit the timely filing of the present Petition for Writ of Certiorari.

Statement of Facts

The evidence is accurately summarized in the opinion of the Court of Appeal, and the following summary of the facts is taken from that opinion. See *People v. Canard,* 257 A.C.A. 500 (1967) [65 Cal. Rptr. 15]. Pertinent portions of the record are set out in more detail in the arguments.

> "Defendants Stafford and De Maddalena were members of the Los Angeles Police Department. Stafford was a supervising sergeant assigned to the bookmaking detail of the Central Vice Division. He was an acknowledged expert in bookmaking law enforcement. Late in 1963, upon the recommendation of Stafford, Officer De Maddalena was transferred to the Central Vice bookmaking detail to work under Stafford. On February 1, 1964, De Maddalena and Officer Joseph Gunn were assigned as partners to work the West Los Angeles area." 257 A.C.A. at 504 [65 Cal. Rptr. at 18].
>
> "On February 15, Gunn and De Maddalena were on an assignment at the Kismet Bar, when

De Maddalena stated, 'Here's some money for you.' He handed Gunn a $50 bill and told him 'It's for your New York vacation!' Gunn asked what he had to do for the money and De Maddalena said, 'You won't have to do anything. You won't know anything about anything. All you have to do is get your money from me. This concerns something that is out of our district and we can go ahead and make our arrests every month and it won't be any concern to us.'

"After leaving De Maddalena, Gunn went directly to Lieutenant Wilson, the acting division commander, and told him what had transpired. At a meeting held on February 17, with Captain Nelson (the administrative vice-commander) and Captain Mills (the internal affairs commander) both in attendance, Gunn was instructed to go along with De Maddalena in order to find out all the officers and criminal elements involved. He was to report what he found out to Captain Mills.

"The next time Gunn saw De Maddalena was on February 18. De Maddalena told him he would be paid $200 once a month. On February 20, outside the Clown Town Bar, De Maddalena, then in a state of intoxication, showed Gunn the last page of his personal notebook. It contained letters and numerals. He told Gunn it was a code and represented the phone numbers for 17 'front and back offices' for Cyril Myers, the biggest sports bookmaker in Los Angeles.

"'Front offices' and 'back offices' are terms used to describe places where illegal bets are received and recorded by bookmakers. A front of-

fice is staffed by a clerk who takes bets phoned in by bettors and temporarily records them on objects which are quickly destructible. The back office is the place where the bets are thereafter permanently recorded, usually on pads called betting markers. Periodically, the back office clerk telephones the front office clerk, and the latter relays the bets received and then destroys his record.

"After showing Gunn his notebook, De Maddalena stated that Gunn's job would be to periodically check 'the telephone board' at Administrative Vice." 257 A.C.A. at 505 [65 Cal. Rptr. at 18-19].

"When an Administrative Vice officer wants the address for a telephone number of a suspected bookmaking establishment, he writes the number on a clipboard referred to as 'the telephone board.' It is kept by an employee in the administrative section of the department. By calling the intelligence division (who would in turn contact the telephone company), the employee secures the address of the telephone for the investigating officer." 257 A.C.A. at 505-06 [65 Cal. Rptr. at 19].

"De Maddalena told Gunn that he should bring the telephone numbers he got off the telephone board to him to check against the numbers in his notebook. If they matched one of the numbers of Cyril Myers, he would warn him about the impending investigation.

"On February 22, De Maddalena told Gunn that the payoff would be on the 15th of the month.

He stated, on February 26, that Sergeant Stafford was part of the deal. The next day he said that Canard, of the Crown Hill organization at Third and Lucas Streets, and some other bookmakers were also involved.

"On February 27, De Maddalena said he had to attend a meeting in Pasadena with Myers and that Stafford would probably be there. Two days later he told Gunn about having gone to the meeting. He said that Stafford, Myers and Maury Adler, who managed Myer's [sic] dress shop at Wilshire and Oxford, were at the meeting; Myers told them that he had changed his phone numbers; Myers also agreed to pay them $200 a month. De Maddalena further stated that he had mentioned Gunn's name at the meeting.

"On March 4 De Maddalena told Gunn that five bookmakers, including Myers and Canard, were paying them off; Pete Stafford had only about four months to go in Central Vice; when he finished his tour of duty, he and Gunn would be the bosses of the operation; Stafford was picking up all the money and making all the payoffs; because Stafford had numerous ways 'to cut the pot,' he couldn't afford to give them more than $200 each; Stafford himself cleared about $700 or $800 a month.

"On the same date, De Maddalena instructed Gunn to copy down certain telephone numbers. He gave Gunn 16 numbers. Some, he said to put under Crown Hill, including DU 9-0888. Some, he told Gunn to put under Cyril Myers name, including a back office number, PL 4-2261 and a front

office number, RE 3-4745. Madison 6-4572 was to be put under the name George Miller. Gunn was also given Myers' and Stafford's home numbers and Adler's numbers at Myers' dress shop. De Maddalena said that, if any of the numbers came up and he was not around, Gunn was to call 'Cy, Maury or Pete' and warn them. To identify himself when he called, he was instructed to say 'this is Mr. Harris calling.'" 257 A.C.A. at 506 [65 Cal. Rptr. at 19-20].

"On March 9, De Maddalena told Gunn he was going to see George Miller; he would get some money from Miller for protecting a Barboudi game Miller was going to open up. On March 11, Gunn was told by De Maddalena that he planned to see Stafford on Sunday to pick up their money.

"Gunn reported everything De Maddalena had told him to his superiors. On March 12, following a plan set up by them, Gunn went at 11:15 a.m. to Administrative Vice and picked up two phone numbers from Lt. Wilson. They were numbers for a back office and a front office listed to Cyril Myers. The front office number was RE 3-4745. He immediately went down to the Internal Affairs Division and from there dialed Pete Stafford's telephone extension. . . ." 257 A.C.A. at 507 [65 Cal. Rptr. at 20].

A conversation took place which is set forth in 257 A.C.A. at pages 507-08 [65 Cal. Rptr. at 20].

"At 11:21 a.m. Stafford was observed leaving the Central Vice office. He went to the lobby of the police building and entered a public telephone booth.

"On the morning of March 12 Sergeant Safford (not to be confused with defendant Stafford) had been instructed by Lt. Wilson to place Apartment 9 at 12036 South Vermont Avenue under observation. Safford had received the phone number PL 4-2261 in connection with that address. At 11:45 a.m. he observed a man carrying a bundle leave the apartment.

"The man was Wayne Galligan. He was operating a back office from that location. He had received a telephone call telling him to leave.

". . .

"In February and March, Canard and a woman known as Michelle Parks were staying in Apartment 5, at 250 South Reno Street. The telephone number of their apartment was DU 9-0888. At 1 a.m. on March 13, pursuant to instructions from Lt. Wilson, Sergeant Safford went to the Reno Street apartment driving an undercover police car. It had been assigned to him since August 1963. The license number was NZK002. As he entered the hallway of the apartment building, he observed Michelle Parks. She approached the door of Apartment 5, turned and looked at him, and then entered the apartment. Safford left the building, circled the block on foot and then returned to his car. After driving a few blocks, he noticed a vehicle without lights following him. When it pulled over and parked, he turned and drove past it. Michelle Parks was standing near the car." 257 A.C.A. at 508 [65 Cal. Rptr. at 20-21].

Later that same morning petitioner Stafford made two telephone calls from the office of Central Vice.

These conversations of Stafford's were introduced in evidence indicating that he had made inquiry with the Department of Motor Vehicles and the vehicle dispatcher office of the Los Angeles Police Department regarding the police vehicle seen in the vicinity of Canard's home. 257 A.C.A. at 509-10 [65 Cal. Rptr. at 21-22].

> "On March 15, Stafford and De Maddalena were observed conversing at a car wash in De Maddalena's car. The next day De Maddalena gave Gunn two $100 bills.
>
> "Pursuant to instructions from their superiors, on March 20 at 8:30 a.m., Lt. Hill, Sergeant Judd and two other officers, approached defendant Stafford after he dropped his son off at school. He was driving a police vehicle. He was told he was assigned to Lt. Hill for the day; that he was the subject of an investigation. They picked up his notebooks, which were lying on the seat of the car, and drove him to a motel where he was searched and then held incommunicado for the next few hours.
>
> "At 10 a.m. Lt. Wilson sent 75 policemen out to the vicinity of the suspected front and back offices, the addresses of which their investigation had uncovered. Those sent to the back offices were instructed that, after receiving a radio signal at about 11:30 a.m., they were to arrest anyone who left the locations. The officers going to the front offices were told to attempt to 'stiff-in' (to place) a wager over the telephone.
>
> "The officers arrested Canard as he left Apartment 5 at the Reno Street apartment building.

They found bookmaking 'owe sheets,' marker pads and two adding machines in the apartment. The phone number there—DU 9-0888—was in Stafford's notebook under Canard's name. It was also in De Maddalena's notebook.

"In all, the investigation undertaken that day revealed evidence of bookmaking at 10 locations the telephone numbers of which both De Maddalena and Stafford had in their notebooks. At one front office the officers were able to 'stiff-in' a bet." 257 A.C.A. at 510 [65 Cal. Rptr. at 22].

Around 11:30 a.m. while the field investigation of March 20 was still in progress, Officer Gunn called Myers and Adler and, using the Harris code, informed them that their back office would be hit. 257 A.C.A. at 510-11 [65 Cal. Rptr. at 22]. These conversations are set forth in 257 A.C.A. at 511-14 [65 Cal. Rptr. at 22-24].

"De Maddalena testified that, shortly after he transferred to Central Vice, Stafford gave him $100, saying 'this is from some people that are taking care of us.' Tommy Canard's name was mentioned. When he went to Administrative Vice in January 1964, Stafford told him he would be paid for protecting Canard, Cyril Myers and others, by watching the Administrative Vice telephone board. Stafford gave him the numbers to be protected and he put them on the last page of his notebook. He received $200 from Stafford for performing this service. The $50 he gave to Gunn was given to him by Stafford with specific instructions to give it to Gunn. In February 1964, he met with Stafford, Myers and Adler at the

Westward Ho Restaurant in Pasadena. At this meeting they agreed to use 'Mr. Harris' as a code name. Gunn was given the $200 for 'going along with the play.' He received the money from Stafford at an Arcadia car wash. In February or March, Stafford told him that George Miller was opening a gambling operation in the downtown area and would also pay for information." 257 A.C.A. at 514 [65 Cal. Rptr. at 24-25].

"One of the front offices hit by the police on March 20 was the Nelson Jewelry Company, located in room 1106 at 215 West Fifth Street. Patricia Locricchio was taking and recording bets from that location. Their phone number appeared in Stafford's and De Maddalena's books. In February and March the rent for room 1106 was paid by a check drawn on the Guardian Bank. Ann Lieber, an employee of the landlord of room 1106, received the check. She put the number 1106 in one corner and deposited it. On April 20 defendant Miller went to the Guardian Bank and asked to see the check, giving the date, drawer and its amount. He said he wanted to see it for a friend named Don. A secretary handed him the check and then turned to take a telephone call. When she came back to Miller, she saw that the check had been written over and the number 1106 had been erased. Miller said 'the handwriting wouldn't be the same on this one as it was on this—on this now as it was in its original form.'

"Stafford testified, denying any involvement in the conspiracy alleged. As part of his job, it was his practice to keep the phone numbers of sus-

pected bookmakers in his notebook. Many of the numbers were supplied to him by informers. He and De Maddalena met Adler and Myers simply by chance at the Westward Ho Restaurant in February 1964, and were invited to dinner by them. They did not discuss bookmaking. He was acquainted with Myers before that time and knew he was a gambler. On March 16, when he was at the car wash, he and De Maddalena were discussing De Maddalena's family and health problems. He did not give De Maddalena any money nor did he receive any money from any of the other codefendants.

"Stafford remembered receiving the telephone call from Gunn on March 12. At the time he thought Gunn wanted to get hold of De Maddalena but that he was double talking because he was talking in front of a superior. He thought the phone number mentioned by Gunn was where Gunn thought De Maddalena might be reached. He went to a phone booth to call the Lake Club which De Maddalena frequented. He used the public phone because personal calls are not permitted from the office. He talked with Ralph Dark who said De Maddalena was not there." 257 A.C.A. at 515 [65 Cal. Rptr. at 25].

"Stafford further testified that on March 13 he found a mug book with a note attached, 'Possibly came out of NZK 002, a 1962 blue Ford.' He did not know where it belonged so he tried Motor Vehicles. When he later called the motor pool to inquire about a car he had used a few days earlier,

he gave the above license number by mistake." 257 A.C.A. at 515-16 [65 Cal. Rptr. at 25].

"In his testimony Stafford stated that he knew Miller. He was reputed to be a gambler. He sometimes got information from him. Miller had once published 'Post and Paddock' which contained tips on the races. He also knew Canard, who was a bartender and small time gambler. Canard also gave him information.

"Of the notation 'Phone Cy' found in his notebook, Stafford testified that the Cy referred to an informer named Cyzeck. His notebook entry 'make meet with Cy, Maury, Hank' referred to Gordon Jones (the Cy being G. J.) Maury Rissman and Officer Hank Weldon.

"Adler testified, acknowledging that he and Myers had dinner at the Westward Ho with Stafford and De Maddalena. According to Adler they met by chance and did not discuss gambling. He knew his employer Myers was a gambler. Concerning the March 20th telephone call he had received, Adler stated that he did not understand what the caller was talking about, 'so he just listened' attempting to recognize the voice. There were two offices over the dress shop. One was referred to as a back office. It had no connection however with bookmaking. He thought the caller might be a robber. He had been a robbery victim twice in the past.

"In his testimony Myers stated that, when he received the call on March 20, he was suspicious and just tried to keep the person talking.

"Miller testified that he knew plenty of bookmakers. He gave Stafford the numbers of several of them to keep him from bothering the customers at his fruit company. He had no connection with room 1106 at 215 West 5th Street. He had gone to the Guardian Bank on April 20 to do a favor for a friend named Dominic, a reputed bookmaker, who told him he bought a money order there and wanted it back. When the woman at the bank refused to let him have it, he did a 'foolish thing,' writing over it. He did not, however, erase the number '1106' on the check.

"Canard did not testify." 257 A.C.A. at 516 [65 Cal. Rptr. at 25-26].

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF PETITIONER STAFFORD AS TO TESTIMONY GIVEN BY HIM BEFORE THE GRAND JURY

Petitioners claim that petitioner Peter Stafford, a police officer employed by the City of Los Angeles, was improperly cross-examined, over defense objection, as to his prior testimony before the Grand Jury of Los Angeles County.

Petitioners base their contention that this prior testimony was given under compulsion upon evidence that (1) Stafford had previously been taken to a motel room without advice as to his constitutional rights, had been ordered to remove his clothes and was searched (including his rectum), and had been interrogated and held incommunicado for several hours; (2) Stafford had been subpoenaed to testify before the Grand Jury and had been told that he would be dismissed from his position as a police officer if he claimed the privilege against self-incrimination. (Petition, p. 10.)

Petitioners rely almost exclusively upon this Court's recent decision in *Garrity v. New Jersey,* 385 U.S. 493.

A. This Court's Ruling in Garrity v. New Jersey, 385 U.S. 493, Should Not Be Applied Retroactively.

The threshold issue presented by petitioners' contention is whether the principles of the *Garrity* case, which was decided on January 16, 1967, should be applied retroactively to the present case.

In affirming petitioners' convictions, the Court of Appeal expressly reserved decision as to this issue and noted:

> ". . . Whether or not that decision will be so applied has not yet been decided by the Supreme Court of this state. We need not decide it here . . ."
> *People v. Canard, supra,* 257 A.C.A. 500, 524 (1967) [65 Cal. Rptr. 15, 31].

The California Supreme Court has not yet ruled whether *Garrity* is to be given retroactive application or prospective application only.

The events which form the basis of petitioners' conspiracy convictions transpired in February and March of 1964. (Cl. Tr. pp. 6-7.) According to Stafford's testimony at the trial, his appearance before the Grand Jury was on April 22, 1964. (Reporter's Transcript [hereinafter referred to as Rep. Tr.] p. 2308.) Petitioners' trial took place in April and May of 1965 (Rep. Tr. p. A-2), and the *Garrity* case was decided during the pendency of petitioners' appeal before the Court of Appeal. *People v. Canard, supra,* 257 A.C.A. 500, 522 (1967) [65 Cal. Rptr. 15, 29-30].

In *Garrity v. New Jersey, supra,* 385 U.S. 493, 500, this Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." In the companion case of *Spevack v. Klein,* 385 U.S. 511, relied upon by the Court in *Garrity* (385 U.S. at 497), the Court held that an attorney could

not be disbarred because he invoked his privilege against self-incrimination in a proceeding to discipline him from professional misconduct.

Spevack squarely overruled the case of *Cohen v. Hurley,* 366 U.S. 117. The *Cohen* case, decided in 1961, was "practically on all fours" with *Spevack* but had led the Court to the opposite conclusion, mainly because *Cohen* antedated this Court's holding in *Malloy v. Hogan,* 378 U.S. 1, that the self-incrimination clause of the Fifth Amendment was applicable to the states by reason of the Fourteenth Amendment. *Spevack v. Klein, supra* at p. 513.

Spevack and *Garrity* are based largely upon the principles of *Malloy v. Hogan, supra,* and *Griffin v. California,* 380 U.S. 609.

See *Garrity v. New Jersey, supra,* 385 U.S. 493, 497;

Spevack v. Klein, supra, 385 U.S. 511, 514-15.

Malloy was decided nearly two months after Stafford's disputed appearance before the Grand Jury. *Griffin,* which was decided on April 28, 1965, during the course of the trial (Cl. Tr. p. 54), has been held not to apply retrospectively. *Tehan v. Shott,* 382 U.S. 406, 419.

This Court has set forth the following considerations that affect the judgment whether a case reversing prior doctrines in the area of criminal law should be applied only prospectively:

> ". . . (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and

(c) the effect on the administration of justice of a retroactive application of the new standards. . . ."

Stovall v. Denno, 388 U.S. 293, 297.

When these criteria are applied to the doctrine of the *Garrity* case, that the prosecution may not use at trial the statements of a police officer who has been advised that if he refuses to answer questions which might incriminate him he will be subject to removal from his position (385 U.S. at pp. 494-95), it is readily apparent that the considerations which in the past have led this Court to limit the applicability of new rules of criminal procedure to future cases have equal force in the present situation.

See DeStefano v. Woods, 392 U.S. 631;
Stovall v. Denno, supra, 388 U.S. 293;
Johnson v. New Jersey, 384 U.S. 719;
Tehan v. Shott, supra, 382 U.S. 406;
Linkletter v. Walker, 381 U.S. 618.

These considerations all militate against giving retroactive application to the doctrine announced in *Garrity.*

"[T]he purpose to be served by the new standards" (388 U.S. at p. 297) will be fully accomplished by prospective application. The Court's stated purpose in *Garrity* was to preclude imposition on the defendant police officers of a choice "between self-incrimination or job forfeiture." *Garrity v. New Jersey, supra,* 385 U.S. 493, 496.

As the Court stated in *Tehan v. Shott, supra,* 382 U.S. 406, the purpose behind the privilege against self-incrimination is to compel constitutionally the prosecution "to establish guilt by evidence independently and

freely secured, and '. . . not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan, supra,* 378 U.S. 1, 8.

> ". . . [T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' . . ."
>
> *Tehan v. Shott, supra* at p. 415.

In contrast to the accused's right to representation by counsel at trial, the privilege against self-incrimination, like the guarantees of the Fourth Amendment, reflects "the concern of our society for the right of each individual to be let alone" and "is not an adjunct to the ascertainment of truth." *Tehan v. Shott, supra* at p. 416.

Moreover, to the extent that the *Garrity* rule seeks to deter police departments or prosecutors from using the threat of forfeiture of employment to coerce a suspected officer into incriminating himself, this purpose would not be advanced by making the rule retroactive. Past coercive practices inflicted upon suspect police officers would not be corrected by reversing their convictions. *See Linkletter v. Walker, supra,* 381 U.S. 618, 637.

The second consideration affecting the determination as to whether a new rule of criminal procedure should be given retroactive application, "the extent of the reliance by law enforcement authorities on the old standards" (*Stovall v. Denno, supra,* 388 U.S. 293, 297), also favors limiting the application of the *Garrity* rule to future cases.

As this Court noted in the companion case to *Garrity, Spevack v. Klein, supra,* 385 U.S. 511, 513, the Court had as recently as 1961 held that the privilege against self-incrimination was not available to an attorney who was the subject of a judicial disciplinary proceeding. *Cohen v. Hurley,* 366 U.S. 117, 125-27. The Court in *Cohen* also held that the Fifth Amendment's privilege against self-incrimination was in any event not applicable to the states by reason of the Fourteenth Amendment, a holding that remained the law until two months after Stafford's disputed appearance before the Grand Jury. *Malloy v. Hogan, supra,* 378 U.S. 1.

In *Tehan v. Shott, supra,* 382 U.S. 406, 417, the Court indicated that reliance by the states on such decisions by this Court was, as it had been in the *Linkletter* decision, "an important factor militating against . . . retroactive application."

Thirdly, "the effect on the administration of justice of a retroactive application of the new standards" (*Stovall v. Denno, supra,* 388 U.S. 293, 297), would perhaps not be widespread but would be severe in view of the difficulty as well as the strong public interest in ferreting out and punishing criminal conduct on the part of law enforcement officers.

As noted in the dissenting opinion of Justice Harlan in *Garrity,* concurred in by Justices Clark and Stewart,

> ". . . . the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our systems of justice of the integrity of local police forces can scarcely be exaggerated. Thus, it need only be recalled that this Court itself has often intervened in state criminal

> prosecutions precisely on the ground that this might encourage high standards of police behavior. See, e.g., Aschcraft v. Tennessee, 322 U.S. 143; Miranda v. Arizona, supra. . . ." (385 U.S. 493, at pp. 507-08.)

Although finality of judgment has sometimes been the standard by which retroactive application has been limited (*see Linkletter v. Walker, supra,* 381 U.S. 618, 639-40), in other cases different standards such as the date of the disputed police practice (*Stovall v. Denno, supra,* 388 U.S. 293, 296, 300), or the date of the commencement of the trial have instead been determinative.

> *DeStefano v. Woods, supra,* 392 U.S. 631, 635;
> *Johnson v. New Jersey, supra,* 384 U.S. 719, 732-33.

> ". . . [T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. . . ."
>
> *Johnson v. New Jersey, supra* at p. 728.

For these reasons respondent urges that this Court limit the application of the new rule of *Garrity v. New Jersey, supra,* 385 U.S. 493, to those cases in which the alleged coercive choice between job forfeiture and self-incrimination was imposed subsequent to the date of the *Garrity* decision.

B. Petitioner Stafford's Testimony Before the Grand Jury Was Not Given Under Compulsion and Therefore Was Admissible Under the Rule of Garrity v. New Jersey, 385 U.S. 493

Petitioner Stafford testified before the Grand Jury of Los Angeles County on April 22, 1964, approximately one month subsequent to the date of the detention and search in question. (Rep. Tr. pp. 1207-10, 2308.) At the trial, approximately one year later, the prosecution sought to impeach Stafford by cross-examining him as to his testimony before the Grand Jury. This effort to impeach Stafford failed almost entirely, as petitioners stressed at the trial (Rep. Tr. pp. 2343-44, 2362, 2364, 2366, 2377, 2398) and as noted in the opinion of the Court of Appeal. *People v. Canard, supra,* 257 A.C.A. 500, 524 (1967). [65 Cal. Rptr. 15, 31.]

However, petitioners insist that the use of Stafford's testimony before the Grand Jury affords ample reason for the granting of their Petition and reversal of the judgments after hearing in this Court. (Petition, pp. 44-46.) Respondent submits that Stafford's testimony before the Grand Jury was given entirely voluntarily and that the use of this testimony did not infect the subsequent trial with any element of unfairness.

The determination as to whether the *Garrity* rule rendered inadmissible at the trial the prior testimony given by Stafford before the Grand Jury poses two questions: (1) whether the events that preceded Stafford's appearance before that body rendered his testimony the product of coercion, and (2) whether *Garrity* can ever apply to statements by the accused which are *ex*culpatory rather than inculpatory in nature.

(1) The Events Preceding Stafford's Appearance Before the Grand Jury

The following evidence, which was received outside the presence of the jury at petitioners' request (Rep. Tr. pp. 1172, 1176, 1179), is the basis for their claim that the events that preceded Stafford's testimony before the Grand Jury rendered this testimony involuntary and therefore inadmissible at the trial.

At 8:30 a.m. on March 20, 1964, Stafford was driving his son to school in a Valiant which had been provided to him for police business. Several police officers had been instructed by Captain Sidney Mills to place Stafford on assignment to Internal Affairs for the day and to take possession of his notebooks as well as any papers relevant to the investigation. (Rep. Tr. pp. 1177, 1180-81.) When Stafford dropped off his son in Temple City, Sergeant Norman Judd (a lieutenant at the time of trial) exited from his police vehicle, approached Stafford, identified himself, and asked Stafford to step out of the Valiant. Stafford's notebooks were on the seat of the Valiant. Sergeant Judd took possession of the notebooks. (Rep. Tr. pp. 1181, 1184-86, 1207, 1224, 1376, 1383.)

According to Stafford's testimony, he removed the notebooks, two of which were his personal property, from his pockets when ordered to do so by Sergeant Judd.[1] He kept police information inside the two personal notebooks. (Rep. Tr. pp. 1291-92, 1305.) Pursuant to the officers' request, he removed his gun and his badge and was searched without his consent. (Rep.

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[1]The notebooks contained information that was offered against petitioners at the trial. *See People v. Canard, supra,* 257 A.C.A. 500, 515 (1967) [65 Cal. Rptr. 15, 25].

Tr. pp. 1188, 1292-93.) The officers did not have an arrest warrant or search warrant, and Stafford was not advised of his constitutional rights. (Rep. Tr. pp. 1177-78, 1196-97, 1296.)

Stafford was told that he was the subject of an investigation and assigned to Lieutenant Robert Hill for the day. (Rep. Tr. pp. 1182, 1188, 1236.) Lieutenant Hill and Stafford got into Sergeant Judd's vehicle. According to Stafford, he was told to get in the back of the police vehicle and sit on the prisoner's side (the right rear side). Rep. Tr. pp. 1237, 1293.) Stafford was driven to the Sunny Cal Motel located in San Gabriel, a community neighboring Los Angeles. (Rep. Tr. pp. 1181, 1183, 1208, 1295.)

Sergeant Judd, Lieutenant Hill, and two other lieutenants were present in the motel room with petitioner Stafford. Stafford was requested to empty his pockets and to disrobe. When he had undressed except for his shorts, he indicated that he did not care to disrobe further but Lieutenant Hill ordered him to do so. (Rep. Tr. pp. 1197-1200, 1266.) Stafford's account, denied by the officers, was that Lieutenant Hill threatened to "tear" off Stafford's shorts. (Rep. Tr. pp. 1199, 1295.) Stafford was given a skin search, which included an examination of his anal orifice and the area underneath his testicles. (Rep. Tr. pp. 1212-13.) Nothing was discovered during the course of the skin search. (Rep. Tr. p. 1202.)

Stafford was kept in the motel room from shortly after 8:30 a.m. until 1:00 or 1:30 in the afternoon. (Rep. Tr. p. 1213.) During this period he was kept under constant observation, including his visits to the toilet area. He was not allowed to leave, and his re-

quest to telephone his wife was refused. (Rep. Tr. pp. 1245-46, 1248, 1252-53.) The purpose of the detention was to conduct the personnel investigation and secondly to prevent Stafford from communicating with anyone else connected with the investigation. (Rep. Tr. p. 1251.) From the motel Stafford was taken to the Police Administration Building, where he was questioned until 11:00 or 12:00 that night, when he was taken home, his automobile and garage searched, and certain papers taken. According to Stafford, this was done over his protest. (Rep. Tr. pp. 1247-48, 1267-68, 1302-03.)

Lieutenant Hill based his authority over Stafford on the fact that Stafford was "employed as a policeman." (Rep. Tr. p. 1257.) (Officer De Maddalena, a codefendant, was taken to another motel and given a skin search. (Rep. Tr. pp. 1277, 1280.))

Stafford testified that he suffered from a pancreas disorder that required him to eat often and that he was refused permission to eat from about 10:30 a.m. to 1:00 p.m., when he was given a cheese sandwich. He also testified that he refused a request of the officers that he telephone his wife and permit them to record the conversation. Stafford also testified that from 2:00 p.m. to 5:00 or 6:00 p.m. on the day in question, he was placed in a chair in the interrogation room at the police building. He was not questioned during that period and was told to look at a wall and not to turn his head. (Rep. Tr. pp. 1299, 1308.) Thereafter he was questioned without being advised as to his constitutional rights. He was told that his refusal to answer questions "would be insubordination." (Rep. Tr. pp. 1300-02.) Although he was aware "that civilians had that opportunity" not to answer questions, he also

was aware that he "would be put in insubordination if [he] refused to answer any questions." (Rep. Tr. p. 1310.) He felt he would be disciplined or dismissed if he failed to comply with any of the officers' orders. (Rep. Tr. p. 1312.)

When Stafford appeared before the Grand Jury approximately one month subsequent to the aforementioned events, the subject of the Grand Jury's investigation was described to him and he was informed that he was a suspect and could be indicted on one or more felony charges. Stafford stated that he understood this and related, in response to questions, that he had an attorney (one Max Herman) with whom he had spoken prior to appearing before the Grand Jury. His attorney had advised him of all his constitutional rights as a suspect of a crime. (Rep. Tr. pp. 2309-10.)

Stafford testified further before the Grand Jury:

> "'Q Do you know what your legal rights are as an individual that might be suspect of a crime in testifying before a body under oath?
>
> "'A Yes, sir.
>
> "'Q Now, under the circumstances of the law of our State, Mr. Stafford, you can't be a witness before the Grand Jury, a Grand Jury that is inquiring into a possible criminal indictment against you, unless you volunteer to do that. Do you understand that?
>
> "'A Yes, sir.
>
> "'Q Now, are you here because you want to be here?
>
> "'A Yes, sir.

"'Q And is it your desire to ask the permission of this Grand Jury to testify before it?

"'A Yes, sir.

"'Q You want to testify?

"'A Yes, sir.

"'Q Nobody is forcing you to do this?

"'A No, sir.

"'Q This is a free and voluntary act on your part, is that right?

"'A Yes, sir.

"'Q Nobody has promised you that if you testify here that you would get a lesser sentence if you were convicted or probation or be permitted to plead guilty to any lesser offense, have they?

"'A No, sir.

"'Q Now, if you, as you have indicated, decide that you want to answer questions and testify before this body, you understand you also have the right to refuse to answer any question the answer to which might tend to incriminate you even though you want to testify? You don't have to answer it unless you want to. Do you understand that?

"'A Yes.

"'Q And you can stand on the constitutional provisions of the United States and of our state and that you don't have to answer a question that might incriminate you. You just tell us that.

"'A I understand that, yes.

"'Q And if any question is put to you by any person here and you want to have some time to talk to your lawyer, you understand you can go talk to your lawyer?

"'A Yes, sir.

"'Q And consult with him first. We will give you every opportunity. Do you understand?

"'A Yes, sir.

"'Q And if at any time, why, you want to interrupt the proceedings to counsel with your attorney, we'll let you do that, too. Do you understand that?

"'A Yes, sir.

"'Q And under these circumstances, do you now request this Grand Jury to give you the permission to testify regarding the matters that are pending before it?

"'A Yes, sir.

"'Q Incidentally, anything that you do testify to here, if you should be indicted, you understand it could be used against you in any other proceedings?

"'A Yes, sir. My lawyer explained all this to me.'" (Rep. Tr. pp. 2310-13.)

Stafford testified at the trial that the foregoing questions and answers accurately reflect his testimony before the Grand Jury. (Rep. Tr. p. 2313.) The Grand Jury proceedings were secret, and Stafford was not permitted to have his attorney present. Stafford testified that even after receiving the above quoted admonitions from the prosecuting attorney at the outset of the Grand Jury proceedings, he still "knew that if I refused to testify, I'd be fired." (Rep. Tr. pp. 2313-14.)

Stafford testified that during the month between his detention and his appearance before the Grand Jury, he was told by Captain Mills, "'You know that you are police officers and cannot take the Fifth Amendment. If you do take the Fifth Amendment, you'll be

fired. You understand that, don't you?'" (Rep. Tr. pp. 2305-06.) According to Stafford, on another occasion while being interrogated, the same thing in essence was told to him. (Rep. Tr. pp. 2306-07.) This testimony was essentially uncontradicted and was consistent with Los Angeles Police Department Rules. (Rep. Tr. pp. 971-72.)

Stafford testified that he went before the Grand Jury because he did not want to lose his job. He had a police hearing pending and at that time no charges had been brought against him. He had been on the police force almost seventeen years and did not want to lose his lifetime pension of $400 a month. (Rep. Tr. p. 2307.)

At the trial defense counsel raised in substance the objection raised in *Garrity,* that Stafford's testimony before the Grand Jury was given under compulsion and was therefore inadmissible—in the present case as impeachment. (Rep. Tr. pp. 2298-2301.)

Following the hearing outside the presence of the jury at which the evidence set forth above was received, the trial court made lengthy findings that in view of the legal warnings given Stafford at the outset of his testimony before the Grand Jury and Stafford's responses thereto, his testimony before that body was freely and voluntarily given. (Rep. Tr. pp. 2315-17.)

Part of the trial court's ruling was as follows:

> ". . . [H]e was not under a compulsion whatsoever, in view of the complete statement that was made to him, and his answers in response to those statements.

"It might also be suggested by the Court that if the Court were to adopt the objection raised by Mr. Parsons, then a person could under similar conditions with complete impunity testify to almost anything before the Grand Jury, and then rely on his Constitutional rights and not be fearful of any consequences, since he would feel that he had been safe in testifying to any matters before the Grand Jury because it couldn't be used against him in any subsequent proceeding." (Rep. Tr. pp. 2316-17.)

In evaluating the propriety of the actions which transpired in the motel room and the Police Administration Building on March 20, 1964, it is important to remember that petitioner Stafford was a police officer and not an ordinary civilian. Lieutenant Hill specifically based his authority over Stafford on this fact. (Rep. Tr. p. 1257.) This is particularly relevant to petitioners' complaint that the motel to which Stafford was taken was outside the city limits of Los Angeles. (Petition, p. 16.)

As a police officer Stafford was under a duty to obey all but the most blatantly unreasonable commands.

Under the present circumstances the orders of the officers assigned to Internal Affairs were severe but not unreasonable in the sense of being arbitrary or capricious. Sergeant Stafford was the supervising bookmaking sergeant in Central Division vice and was perhaps the oustanding bookmaking investigator in California. (Rep. Tr. pp. 86-87, 116.) Upon learning that a person in Stafford's position was in the employ of criminal elements in Los Angeles, the police had to take severe measures.

As this Court had recent occasion to note, a police officer

> ". . . is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one. . . ."
>
> *Gardner v. Broderick,* 392 U.S. 273, 277-78.

The Los Angeles Police Department properly felt that Stafford's detention and interrogation, and the search of his person and effects, was necessary to the accomplishment of the personnel investigation of the suspect officers. Undoubtedly the investigating officers hoped to discover additional documentary evidence of Stafford's guilt such as that found in his notebooks. Secondly, it was felt essential to keep Stafford incommunicado so that he would not forewarn the other conspirators that the bookmaking-bribery ring had been uncovered. (Rep. Tr. p. 1251.) Seventy-five officers were in the field awaiting the order to arrest suspects at bookmaking locations. In the end the investigation undertaken that day revealed evidence of bookmaking at ten locations of which both Stafford and De Maddalena had the telephone numbers in their notebooks. *People v. Canard, supra,* 257 A.C.A. 500, 510 (1967) [65 Cal. Rptr. 15, 22].

Stafford and De Maddalena were taken at first to motel rooms rather than to the police building for the

apparent reason that the police felt there might be other officers involved in the conspiracy who would be forewarned, thus jeopardizing the mass investigation, if they were to see Stafford and De Maddalena being brought to the station in detention.

In any event, in evaluating petitioners' claim of error it is essential not to lose sight of the primary consideration, *viz.*, whether the unpleasantness to which Stafford was subjected, properly or not, rendered his testimony before the Grand Jury one month later the product of coercion.

Respondent submits that assuming, but not conceding, that petitioner Stafford was subjected to an improper investigation on March 20th, this fact as well as any intimation that he would be disciplined or dismissed in the event he refused to testify before the Grand Jury did not render his testimony before that body involuntary and therefore inadmissible at the trial under *Garrity v. New Jersey,* 385 U.S. 493.

The test, as expressed by this Court, is

> ". . . '[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' . . ."
>
> *Wong Sun v. United States,* 371 U.S. 471, 488;
> *See also, Hoffa v. United States,* 385 U.S. 293, 308-09;
> *Nardone v. United States,* 308 U.S. 338, 341;
> *Smith v. United States,* 324 F.2d 879, 881-82 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 954;

Payne v. United States, 294 F.2d 723, 726-27 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 883; *People v. Ditson,* 57 Cal. 2d 415, 443-44 (1962) [20 Cal. Rptr. 165, 181].

From the opinion of this Court in *Garrity,* that case appears to have involved uncontradicted evidence that the prior testimony was given under duress.

The contrast between the defendants' pre-trial interrogation in *Garrity* and petitioner Stafford's appearance before the Grand Jury is striking.

In *Garrity* the questioning of each defendant began with an explanation of his legal rights and the warning that, in accordance with a New Jersey statute, "if he refused to answer he would be subject to removal from office." *Garrity v. New Jersey, supra* at p. 494.

In the present case while there is evidence that fellow officers had intimated in the weeks preceding the Grand Jury hearing that Stafford would be subject to discipline in the event he refused to testify, the Grand Jury proceeding was apparently free from any such coercive suggestions.

As set forth above, at the outset of the hearing Stafford was given a painstakingly detailed account of his legal rights by the prosecuting attorney. Stafford testified that before his appearance he had conferred with his attorney, who had also explained Stafford's constitutional rights. Stafford testified further that he understood his rights, including the fact that he could testify before the Grand Jury only if he volunteered to do so. Stafford's testimony indicated expressly that he had appeared because he freely and voluntarily desired to do so and that no one had forced him to do

so. He understood that he could claim his privilege against self-incrimination as to any question that might incriminate him. Stafford was also told that he could interrupt the proceedings at any time to consult with his attorney before answering any question. (Rep. Tr. pp. 2309, 2313.)

At the time Stafford chose to testify before the Grand Jury, weeks had elapsed since the motel room detention and the intimations that he might be fired in the event he refused to testify. These events were superseded by the explanation of his legal rights received by Stafford at the outset of the Grand Jury hearing and his testimony at that hearing expressly indicating his uncoerced decision to testify.

In light of the present record it appears that Stafford's appearance before the Grand Jury was precisely "the situation where one who is anxious to make a clean breast of the whole affair volunteers the information." *Garrity v. New Jersey, supra* at p. 499.

(2) The Applicability of Garrity v. New Jersey, 385 U.S. 493, to Statements That Were Neither Confessions Nor Admissions But Merely Exculpatory Statements Used to Impeach the Credibility of Petitioner Stafford as a Witness

Garrity v. New Jersey, supra, 385 U.S. 493, speaks in terms of using "the threat of discharge to secure *incriminatory evidence* against an employee." (Emphasis added.) *Supra,* at p. 499.

The disputed testimony of Stafford before the Grand Jury was all exculpatory and was used at the trial only to impeach Stafford's credibility as a witness after Stafford had taken the stand and made a general de-

nial of any involvement in the conspiracy charged. *People v. Canard, supra,* 257 A.C.A. 500, 515-16 (1967) [65 Cal. Rptr. 15, 25].

At the trial, Stafford testified that he found a mug book (Exh. V or W; belonging to one Officer Dohler) while cleaning out his file cabinet. It had a note attached that said, "Possibly came out of NZK 002, a 1962 blue Ford." The Department of Motor Vehicles did not have the car listed. Stafford had lost a book a few days earlier. When he called down to the garage he mistakenly referred to NZK 002, which he had on his mind. (Rep. Tr. pp. 2255-58.)

At the time Stafford testified before the Grand Jury, he did not recall that the presence of NZK 002 in his book had been the result of an inquiry about Exhibits V and W. (Rep. Tr. p. 2274.)

The Grand Jury proceeding took place about one year before the trial. Stafford had had a chance to refresh his recollection. The use of the Grand Jury testimony merely tested his memory and veracity as a witness.

At the trial, Stafford testified that Myers reputedly knew a lot of gamblers. (Rep. Tr. p. 2203.)

Before the Grand Jury, Stafford testified that Myers was reputed to be the money behind gambling and that it had been known that he did some bookmaking. (Rep. Tr. p. 2343.) Petitioners contended at the trial that this was no impeachment at all. (Rep. Tr. p. 2343, lines 16-19; p. 2344, lines 5-7.)

Before the Grand Jury, Stafford also testified that he had information that Al Glassman was running a back sports office for Myers. (Rep. Tr. p. 2399.) Pe-

titioners contended at the trial that this was not impeaching. (Rep. Tr. p. 2377, lines 1-3; p. 2398, lines 5-6.)

At the trial, Stafford merely elaborated in greater detail on Myers' reputation.

Before the Grand Jury, Stafford testified that he did not recall the meaning of the entry in his notebook "Make meet with Cy, Maury, Hank." The only thing he could think of was,

> " 'Well, when we went to the Westward Ho restaurant I discussed with him the week prior about that I knew that Myers sometimes ate there, and I also knew—I told him, like I told you before, that he is, you know, reputed to be one of the big backers of bookmaking, and he was in the district.' " (Rep. Tr. p. 2363.)

He did not remember which Maury he was talking about. (Rep. Tr. pp. 2362-65.) Petitioners contended at the trial that this did not constitute impeachment. (Rep. Tr. p. 2362, lines 15-17; p. 2364, lines 4-6; p. 2366, lines 23-25.)

At the trial, Stafford testified that "Make meet with Cy, Maury, Hank" referred to Gordon Jones (it was a "J", not a "Y"), Hank Weldon, and Maury Rissman. (Rep. Tr. p. 2361.)

Before the Grand Jury, Stafford had claimed not to remember the significance of the entry and related the only thing he could think of. At the trial, his memory of the significance of the entry was somewhat better.

Respondent submits that by its language the *Garrity* opinion is limited to the exclusion of incriminating evidence and was never intended to enable a defendant to take the witness stand, issue a general denial of the alleged offense, testify that his prior statements were the result of coercion, and thereby insulate himself from impeachment on cross-examination.

See People v. Genser, 250 Cal. App. 2d 351, 354-55 (1967) [58 Cal. Rptr. 290, 291], which discusses the *Garrity* opinion.

As Justice Frankfurter wrote for the Court in *Walder v. United States,* 347 U.S. 62,

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession wa. obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .

". . . [T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. . . ."

Walder v. United States, supra at p. 65;

See also Brown v. United States, 356 U.S. 148, 155-56.

C. Assuming But Not Conceding Error in the Use at Trial of Petitioner Stafford's Prior Testimony Before the Grand Jury, Such Error Was Harmless Beyond a Reasonable Doubt Under Chapman v. California, 386 U.S. 18, Particularly With Regard to the Other Petitioners

In the recent case of *Chapman v. California,* 386 U.S. 18, this Court recognized that not all error of a constitutional magnitude requires reversal of the judgment convicting an accused.

The test set forth in *Chapman* is that "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Supra,* at p. 24. *See also Fahy v. Connecticut,* 375 U.S. 85, 86-87.

This was precisely the test applied by the California Court of Appeal in evaluating the contention of petitioners that they were entitled to reversal of their convictions under the *Garrity* decision:

> ". . . [A]ssuming that error was committed, it was not prejudicial. Beyond a reasonable doubt, the error in permitting the use of the grand jury testimony could not have prejudiced Stafford. (Chapman v. California (1967) 386 U.S. 18, 24. . . .)"
>
> *People v. Canard,* 257 A.C.A. 500, 525 (1967) [65 Cal. Rptr. 15, 31].

Respondent submits that from an examination of the disputed Grand Jury testimony, set forth above in the preceding subargument, it is clear beyond a reasonable doubt that petitioner Stafford could not have been prejudiced by the minimal and almost totally ineffective impeachment effected by use of his prior testimony before the Grand Jury.

It is true, *a fortiori,* that the other petitioners could not have been prejudiced by the use of this prior testimony to impeach Stafford. This conclusion is fortified by the trial court's instructions to the jury which limited the impeachment to Stafford's credibility as a witness. The instructions also served to minimize any prejudice to Stafford himself. (Cl. Tr. pp. 84, 88-89, 91-92; *see also* Rep. Tr. pp. 2323-24.)

II

THE DETENTION AND SEARCH OF PETITIONER STAFFORD WERE NOT VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS' PROSCRIPTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

Petitioners contend that petitioner Stafford was denied the right to a fair trial and due process of law, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, by reason of his detention, the allegedly unlawful search, and the use of the fruits thereof at the trial. (Petition, p. 28.)

Petitioners' argument is largely a recasting, in terms of search and seizure, of the contention discussed in the previous argument herein. Respondent therefore incorporates the previous argument insofar as it relates to Stafford's rights under the Fourteenth Amendment as defined by the Fourth Amendment.

Petitioners' claim of unreasonable search and seizure must confine itself at this stage of the proceedings to the assertion that certain evidence, physical or testimonial, was received in evidence at the trial (*Mapp v. Ohio,* 367 U.S. 643, 655) as the result of the search and seizure of their persons, or of the search of proper-

ty and the seizure of evidence in which they had an interest.

Simmons v. United States, 390 U.S. 377, 389-90;

Jones v. United States, 362 U.S. 257, 261.

These principles apply to limit petitioners' claim of unreasonable search and seizure as follows. First, the argument in question can be made in this forum only by petitioner Stafford since he alone among the petitioners can be alleged to have been "the victim of an invasion of privacy." *Jones v. United States, supra* at p. 261. The other petitioners had no interest in any premises searched or property seized. Secondly, the only items of evidence which belonged to Stafford and whose *reception at the trial* are contested by petitioners on the ground of unlawful search and seizure are the two notebooks (Exhibits 69 and 70) which were taken from the seat of the police Valiant when Stafford was stopped at the school on March 20th.

Petitioner Stafford's detention at the motel and later in the day at the police building is not alleged to have resulted in the reception of any evidence at the trial, with the exception of the testimony given by Stafford before the Grand Jury, a matter discussed in the preceding argument. Assuming, but not conceding, that Stafford's detention by his fellow police officers constituted an unlawful arrest, this fact alone would have no bearing on the validity of his conviction. This Court has held that even the unlawful and forceful abduction of an accused by law enforcement officers does not in itself impair the validity of the proceedings at his trial. *Frisbie v. Collins,* 342 U.S. 519, 522-23.

Turning to the seizure of the two notebooks, respondent submits that the detention of Stafford at the school was proper and that the evidence retrieved incidentally thereto was properly received at the trial over objection. (Cl. Tr. pp. 32-34; Rep. Tr. pp. 1177-78.)

Depite petitioners' implication to the contrary, neither federal nor California law required the investigating officers to obtain an arrest warrant or search warrant to detain Stafford and search his person. (Rep. Tr. p. 1177.)

United States v. Rabinowitz, 339 U.S. 56, 65-66;

People v. Winston, 46 Cal. 2d 151, 162-63 (1956) [293 P. 2d 40, 47].

When Stafford dropped off his son at school, Sergeant Judd approached Stafford, identified himself, and asked him to step out of the Valiant (a police-owned vehicle). There is ample evidence in the record indicating that the notebooks were in plain sight on the seat of the Valiant. Sergeant Judd took possession of the notebooks after Stafford left the vehicle. (Rep. Tr. pp. 1124, 1180-81, 1184-86, 1207, 1224, 1376, 1383.)

This evidence was contradicted by the testimony of Stafford, who claimed to have removed the notebooks from his pockets when ordered to do so by Sergeant Judd. Stafford claimed further that he had purchased the two notebooks with his own money, although he admitted that he kept information concerning official police business inside these notebooks. (Rep. Tr. pp. 1291-92, 1305, 2157.) The notebooks contained information that was offered against petitioners at the trial.

See People v. Canard, supra, 257 A.C.A. 500, 515 (1967) [65 Cal. Rptr. 15, 25.].

To avoid undue repetition, respondent refers to its previous argument regarding the right of the Internal Affairs officers to conduct a personnel investigation of the department's police officers. In light of these special circumstances it is submitted that the ordinary rules of arrest and search and seizure do not apply.

Moreover, it is significant that the vehicle Stafford was driving belonged to the police department and not to him. The notebooks were records of official police business. That Stafford may have purchased the notebooks with his own funds does not seem significant; certainly a police officer cannot insulate records of official police business from inspection by the police department merely by entering them in a notebook which he has paid a few cents to purchase.

Davis v. United States, 328 U.S. 582, 588-91;
Wilson v. United States, 221 U.S. 361, 380;
United States v. Collins, 349 F.2d 863, 867-68 (2d Cir. 1965), *cert. denied,* 383 U.S. 960.

But even in the event the detention of Sergeant Stafford and the seizure of the notebooks were to be judged by the standards applicable to confrontations between the ordinary citizen and the police, the detention and seizure here would pass muster under the Fourth and Fourteenth Amendments.

The information in the possession of the investigating officers was not only enough to justify them in detaining Stafford on the street and subjecting him to a cursory search (*see Terry v. Ohio,* 392 U.S. 1) but was sufficient to afford them probable cause for

his arrest and justify a search incidental thereto. *United States v. Rabinowitz, supra* at pp. 60-61.

See People v. Canard, supra, 257 A.C.A. 500, 505-10, 518 (1967) [65 Cal. Rptr. 15, 18-22, 27].

However, as previously noted there is substantial evidence in the record which indicates that the notebooks were already in plain sight on the seat of the Valiant at the time Stafford was approached by the investigating officers, and therefore no search took place.

People v. Harris, 67 Cal. 2d 866, 871 (1967) [64 Cal. Rptr. 313, 317], and cases cited therein.

See also United States v. Lee, 274 U.S. 559, 563.

The notebooks were subject to seizure whether they are viewed as instrumentalities of the offense or as mere evidence of the offense.

Warden v. Hayden, 387 U.S. 294, 300;

People v. Thayer, 63 Cal. 2d 635, 642 (1965) [47 Cal. Rptr. 780, 784], *cert. denied,* 384 U.S. 908.

See People v. Canard, supra, 257 A.C.A. 500, 518 (1967) [65 Cal. Rptr. 15, 27].

Finally, even if the admission in evidence of the notebooks is deemed erroneous, it is clear beyond a reasonable doubt that petitioners were not prejudiced thereby. *Chapman v. California,* 386 U.S. 18, 24.

III

THE TRIAL COURT PROPERLY REFUSED TO DECLARE A MISTRIAL SOUGHT ON THE BASIS OF UNFAVORABLE NEWSPAPER AND TELEVISION PUBLICITY DURING THE PENDENCY OF THE TRIAL

Petitioners contend that the trial court erred in denying their motion for mistrial founded upon unfavorable newspaper and television publicity during the pendency of the trial. (Petition, p. 31.)

That part of the record bearing upon petitioners' present contention is fully and accurately set forth in the opinion of the Court of Appeal. The relevant portion of the opinion is set forth verbatim below with citations to the record supplied in brackets by respondent.

> "During the progress of the trial, defendants moved for a mistrial on the ground that unfavorable publicity in the local press and on television news prejudiced their chances for a fair trial. The court denied defense requests to poll the jury to determine whether they had read or heard the news reports, and denied their motions for a mistrial. Defendants assign this as error. [Rep. Tr. pp. 359-60, 900-09, 996-1011, 2098-2104.]
>
> "The publicity referred to consisted mostly of substantially accurate reporting by the news media during the trial of the evidence as it was presented. [Rep. Tr. pp. 903, 1003-04; Exhibits D, K, T, and U.] There were two notable exceptions: On April 20, 1965, the prosecution's star witness, Officer Gunn, testified that in a conversation with De Maddalena which concerned the latter's plan to

take over the operation when Stafford left Central Vice, he had asked De Maddalena if he was afraid of Stafford. De Maddalena had indicated he thought he could handle Stafford, although he was known as a 'mean guy' who had 'access to muscle' and who had set up several individuals in the past for a 'working over'; that one of these individuals, a bookmaker named Lipowitz, had been set up by Stafford 'for a working over with a baseball bat.' This testimony was elicited without objection. After it had been received, a motion to strike was denied. However, later in the trial—on May 3, 1965—the court granted defense motions to strike it. [Rep. Tr. pp. 343, 357, 359-60, 2030, 2097.]

"On April 23rd the Los Angeles Herald-Examiner printed a story concerning the statement that Stafford had Lipowitz beaten up with a baseball bat. In the story, details of that beating and another one Lipowitz allegedly received were reported. The details were never brought out at the trial. [Exhibit L.]

"On the 5 p.m. and 11 p.m. KABC-TV Baxter Ward news programs of the same date, Mrs. Lipowitz was interviewed. She was questioned concerning her husband's having been 'worked over.' She stated that she had gone to the trial to see Stafford, because she 'wanted to see what a man looked like, an officer of the law, that could do such a thing as that.' She further stated that putting Stafford in prison for the rest of his life could not adequately punish him for what he had done to her husband; that the testimony of his fellow officers indicated Stafford had had her husband beaten up. [Exhibits R and S.]

"Throughout the trial the court repeatedly, and in clear and unequivocal language, admonished the jurors that they were not to form any opinion on the case until it was submitted to them; that they were not to read any reports of the case in the newspapers, or to listen to or watch any reports of it on radio or TV. In its formal instructions, the court told the jurors that in deciding the case they were to be governed solely by the evidence introduced at the trial and the law as stated by the court. [Cl. Tr. p. 72; Rep. Tr. pp. 53A-54A, 58, 89, 133, 173, 387, 669, 706, 844, 889, 978, 1005, 1032, 1061, 1067, 1155, 1175-76, 1360, 1409, 1625, 1707, 1770, 1856, 1931, 1960, 1975, 2158, 2247, 2293, 2374, 2467, 2537, 2596, 2642, 2738, 2805, 2989, 3055.]

"The trial judge, in denying the motions for mistrial and to poll the jury concerning the news reports, concluded that the publicity was not conceivably prejudicial; that he was satisfied with the integrity and intelligence of the jurors and had to assume they abided by his repeated admonitions; that he would not have the jury polled because he neither wished to arouse their curiosity nor to embarrass them." [Rep. Tr. pp. 907-08, 1010-11, 2104.] *People v. Canard, supra,* 257 A.C.A. 500, 518-19 (1967) [65 Cal. Rptr. 15, 27-28].

Respondent submits that the evidence of the Lipowitz beating was relevant and admissible in that it tended to prove that Stafford was part of the conspiracy. However, the trial court in an effort to be particularly fair struck the disputed testimony relating to the beat-

ing (Rep. Tr. p. 2097), and this certainly obviated any prejudice to Stafford and the other petitioners.

There was nothing in the record establishing that the jurors were aware of, or had been influenced by, the newspaper and television publicity, most of which was a totally accurate reflection of the evidence received in the courtroom and none of which was prejudicial. Under California law the jury was assumed to have heeded the trial court's repeated admonitions not to look at news reports of the case (*People v. Gomez,* 41 Cal. 2d 150, 161-62 (1953) [258 P.2d 825, 832], and in view of these admonitions it was proper for the trial court to refuse to poll the jury.

People v. Lambright, 61 Cal. 2d 482, 486-87 (1964) [393 P.2d 409, 412], *appeal dismissed and cert. denied,* 384 U.S. 434;

People v. Brac, 73 Cal. App. 2d 629, 635-36 (1946) [167 P.2d 535, 538].

None of the publicity is claimed to have occurred prior to the trial, and accordingly no claim is made that any juror came to the case convinced of petitioners' guilt. *Cf. Irvin v. Doud,* 366 U.S. 717, 727.

Petitioners have failed to meet the burden of demonstrating that the press aroused such prejudice against them that they were necessarily precluded from receiving a fair trial.

Stroble v. California, 343 U.S. 181, 191-95;

Cf. Sheppard v. Maxwell, 384 U.S. 333, 354, 356-58, relied on by petitioners.

As the Court of Appeal correctly concluded with reference to petitioners' claim of error:

"Absolutely no evidence was presented that any pretrial publicity could have affected the selection

> of an impartial jury. This case bears no resemblance to Sheppard v. Maxwell, 384 U.S. 333 . . ., relied on by defendants, where, during the six or seven months preceding the trial, there was 'a barrage' of newspaper headlines, articles and other news reporting, slanted against defendant and creating a 'wave of public passion' against him." *People v. Canard, supra,* 257 A.C.A. 500, 519-20 (1967) [65 Cal. Rptr. 15, 28].

Respondent submits that the newspaper and television publicity during the pendency of the proceedings in no way detracted from the fairness of petitioners' trial.

IV

THE INTERCEPTION AND RECORDING OF TELEPHONE CONVERSATIONS MADE BY PETITIONER STAFFORD AND A CODEFENDANT DID NOT VIOLATE THEIR CONSTITUTIONAL RIGHTS OR THE FEDERAL COMMUNICATIONS ACT

Petitioners contend that the interception of telephone conversations made by petitioner Stafford and by a codefendant, Officer De Maddalena, over police department telephones, and the admission in evidence of recordings of these conversations, were violative of their rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution and under the Federal Communications Act. (Petition, p. 36.)

The disputed telephone conversations include several conversations between Officer Gunn and De Maddalena, between Officer Gunn and petitioner Myers, and between Officer Gunn and codefendant Adler. (Rep. Tr. pp. 266-72, 302-13, 328-32; Exhibits 4, 9,

11, and 16-18; *People v. Canard, supra,* 257 A.C.A. 500, 511-14 (1967) [65 Cal. Rptr. 15, 22-24].) However, petitioners' claim of error is directed principally to the interception and recording of petitioner Stafford's telephone conversations with Officer Gunn, the Department of Motor Vehicles, and the police vehicle dispatcher's office. (Rep. Tr. pp. 292-94, 1150-51, 1153-55; Exhibits 7, 56 and 57; *People v. Canard, supra* at pp. 507-08, 509-10 [65 Cal. Rptr. at pp. 20, 21-22.])

The aforementioned evidence was received over petitioners' objection at the trial. (Rep. Tr. pp. 1081-86, 1111.)

Los Angeles Chief of Police William Parker testified that the telephones utilized by the police department, which is a branch of the municipal government of the City of Los Angeles, were maintained exclusively for the conduct of police business. (Rep. Tr. pp. 53-54, 69, 955.) Petitioner Stafford was aware of this fact. (Rep. Tr. p. 2234.) When Chief Parker learned that Central Vice telephones were apparently being used for criminal purposes, he ordered Captain Mills of the Internal Affairs Division to monitor and record conversations of the Central Vice telephones. (Rep. Tr. pp. 51, 55-56, 953-54.) Captain Mills therefore ordered one Officer Briggs to establish extensions to Internal Affairs on the Central Vice telephones. (Rep. Tr. pp. 953-54, 956, 1060-61, 1063.) Between 150 and 200 telephone calls were monitored, without the permission of petitioner Stafford or the other parties to the conversations (with the exception of Officer Gunn.) (Rep. Tr. pp. 1069-71, 1080.)

Respondent submits that the monitoring of the conversations and the reception in evidence of recordings

of the conversations were proper under the Constitution as well as under federal and state statutes.

Although the Federal Communications Act (47 U.S.C. § 605) has been applied to interstate communications (*Weiss v. United States*, 308 U.S. 321, 329), it provides a rule of evidence for federal courts and does not apply to state proceedings.

Schwartz v. Texas, 344 U.S. 199, 203;

People v. Sica, 112 Cal. App. 2d 574, 585-86 (1962) [247 P.2d 72], *cert. denied*, 346 U.S. 831.

Moreover, Chief Parker's order arguably rendered the monitoring and recording an "authorized" interception within the meaning of section 605.

California Penal Code sections 640, 653, and 653j likewise permitted the "authorized" interception of the conversations in question, particularly in light of the fact that only "confidential" communications are within the purview of the statutes forbidding eavesdropping or recording. "Confidential" communications are defined as those "carried on in such circumstances as may reasonably indicate that the parties to such communication desire it to be confined to such parties." Expressly excluded from this definition are communications made under circumstances "in which the parties to the communication may reasonably expect that the communications may be overheard or recorded." Cal. Pen. Code § 653j.

As was held by the Court of Appeal in the present case,

> ". . . Clearly the chief of police, as the person supervising and controlling the use of the phones, was a person authorized to monitor them. Any call

> properly made on those telephones was the business of the chief of police, and hence not confidential as to him or those authorized by him to hear it. It is common knowledge that special security precautions must be taken in police departments; those using the lines could reasonably expect that it could take the form of monitoring calls."
>
> *People v. Canard, supra,* 257 A.C.A. 500, 521 (1967) [65 Cal. Rptr. 15, 29].

In a recent decision this Court made it clear that although the absence of any trespass is no longer sufficient in itself to justify the interception of a telephone communication, it is the degree to which privacy could justifiably be expected that renders the communication immune from interception. *Katz v. United States,* 389 U.S. 347, 350-53.

Although *Katz* and other recent decisions of this Court have stressed the preference that interception be pursuant to court order, respondent submits the fact that the lines were city telephones used only for police business rendered the present interception outside the ambit of the constitutional restrictions imposed upon ordinary interception.

This Court has in the past recognized that such restrictions will vary to the degree that the interception takes place where privacy can reasonably be anticipated.

In *Lanza v. New York,* 370 U.S. 139, the Court upheld surreptitious electronic eavesdropping of a conversation between a prisoner and his wife in the visitors' room of a public jail, although the opinion was premised in part upon the fact that no evidence obtained by the electronic eavesdropping was introduced

against the petitioner in a criminal prosecution. *Supra* at pp. 145-47.

The Court noted:

> "But to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. . . . [W]ithout attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here." (Footnotes omitted.) *Lanza v. New York, supra,* at pp. 143-44.

The *Lanza* opinion evidences the reluctance of the courts to extend into high security areas the constitutional safeguards which traditionally have been confined to places where the individual can reasonably expect that his words will not be overheard or recorded.

See People v. Apodaca, 252 Cal. App. 2d 656, 659 (1967) [60 Cal. Rptr. 782, 784];

People v. Hughes, 203 Cal. App. 2d 598, 601 (1962) [21 Cal. Rptr. 668, 670];

People v. Morgan, 197 Cal. App. 2d 90, 93-94 (1961) [16 Cal. Rptr. 838, 840], *cert. denied,* 370 U.S. 965.

In *Sanitation Men v. Sanitation Comm'r,* 392 U.S. 280, 281, 285 (n.6), a case involving the propriety of a dismissal of public employees, this Court did not reach the wiretap issue. The Court of Appeals had upheld the wiretapping, under court order, of a telephone leased by the New York City Department of Sanitation for the transaction of official city business. (383 F.2d 364, 369 (2d Cir. 1967).)

In the present case respondent, in urging the propriety of the wiretapping in question, relies not only on the fact that city telephones used only for official business were involved, but also on the fact of the security precautions which had to be taken and which reasonably should have been anticipated by Stafford and De Maddalena.

Moreover, respondent submits that the recording and use at trial of those telephone conversations which were between Officer Gunn and the defendants (including petitioners Stafford and Myers) were not unlawful even absent the fact of security requirements and of official city telephones being involved. Since Officer Gunn was one of the participants in the conversations and could have testified as to the content of the conversations, he could consent to their interception and recording.

> *Lopez v. United States,* 373 U.S. 427, 438-39;
> *People v. Fontaine,* 237 Cal. App. 2d 320, 331-32 [46 Cal. Rptr. 855, 864], *vacated on another ground,* 386 U.S. 263.

This is particularly true of the recording, by means of an electronic device worn by Officer Gunn, of a conversation between Gunn and De Maddalena. (Peti-

tion, p. 37; Exhibit 14.) *See Lopez v. United States, supra* at pp. 438-39.

Finally, in view of the fact that the interceptions and recordings were made at a time when the crime of conspiracy was still being committed by the defendants and their liberty had not yet been restricted, their claim of denial of right to counsel is without merit.

Massiah v. United States, 377 U.S. 201, 204-06;

People v. Ing, 65 Cal. 2d 603, 612-13 (1967) [422 P.2d 590, 595-96].

V

PETITIONERS' CONTENTION DISPUTING THE SUFFICIENCY OF THE EVIDENCE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Petitioners contend that "[t]he evidence was insufficient to sustain the judgment of guilty . . . as to any of the petitioners." Petitioners claim specifically "that no conspiracy was established." (Petition, p. 40.)

However, absent a total lack of evidence constituting a denial of due process of law, the sufficiency of evidence establishing guilt is a matter of state law and may not be raised in seeking federal review of a state conviction.

Fernandez v. Klinger, 346 F. 2d 210, 211 (9th Cir. 1965), *cert. denied,* 382 U.S. 895;

Schlette v. People of State of California, 284 F.2d 827, 834 (9th Cir. 1965), *cert. denied,* 366 U.S. 940.

In any event the evidence as disclosed by respondent's Statement of Facts herein was clearly sufficient to sustain the judgments of conviction for conspiracy to obstruct justice, commit bribery, and engage in bookmaking on the part of each of the petitioners.

As was correctly held by the Court of Appeal in the present case:

> "The evidence above summarized is amply sufficient to support the finding of the existence of the conspiracy charged. A conspiracy may be established by circumstantial evidence. (People v. Steccone, 36 Cal.2d 234, 237-238 [223 P.2d 17]; People v. Salani, 218 Cal.App.2d 835, 839 [32 Cal.Rptr. 592].) It is not necessary for the People to show that the defendants actually met and agreed together to perform the unlawful acts. (People v. Steccone, supra, p. 238.) From their acts and conduct in mutually carrying out the common illegal purpose, the existence of the conspiracy may be inferred. (People v. Danielson, 203 Cal.App.2d 498, 505 [21 Cal.Rptr. 469].) The circumstances here clearly indicate the existence of and the carrying out of a scheme to give protection to certain bookmakers through the bribery of police officers. The involvement of each appealing defendant in the conspiracy was plainly shown." *People v. Canard, supra,* 257 A.C.A. 500, 516-17 (1967) [65 Cal. Rptr. 15, 25].

VI

THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE AS TO THE DISPOSITION OF THE CASES IN WHICH BOOKMAKING ARRESTS WERE MADE DURING THE INVESTIGATION IN QUESTION

Petitioners contend that the trial court committed prejudicial error in denying the defense the right to introduce in evidence the disposition of those cases in which arrests were made on March 20, 1964, for bookmaking in the course of the investigation in question. (Petition, p. 42.)

Respondent submits that this contention, too, does not involve a substantial federal question.

Under California law the determination as to whether offered evidence is relevant is a matter for the trial court's discretion. *People v. Tahl,* 65 Cal. 2d 719, 740 (1967) [423 P.2d 246, 259], *cert. denied,* 389 U.S. 942.

The scope of the trial court's discretion was broad, and it is clear from the opinion of the Court of Appeal that it was not an abuse of this discretion for the trial court to exclude the evidence in question (Rep. Tr. pp. 1703, 1706):

> "Defendants predicate error on the trial court's denial of their request to introduce evidence concerning the ultimate dispositions of the various cases in which arrests were made for bookmaking during the March 20th raids. The court correctly ruled against allowing in such evidence. The results of the investigation were admitted to show the nature of the places the telephone numbers of which Stafford and De Maddalena had in their

notebooks. Whether the occupants of those places were subsequently tried and convicted of bookmaking (or were acquitted, or had their cases dismissed), depended on such extraneous factors as the technical rules of evidence or whether guilt was proven beyond a reasonable doubt, matters having no relevancy to the issues of this case."

People v. Canard, supra, 257 A.C.A. 500, 521 (1967) [65 Cal. Rptr. 15, 29].

Conclusion

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
RONALD M. GEORGE,
Deputy Attorney General,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 80

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Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENT IN OPPOSITION

RUSSELL E. PARSONS and
HARRY E. WEISS.
For Petitioner Canard
RUSSELL E. PARSONS
For Petitioners Stafford, Myers and Miller
ARTHUR LEWIS, *Of Counsel*
For Petitioners Myers and Miller
205 South Broadway
Los Angeles, California 90012
Telephone: (213) 626-9167

Offset printed by: Dean-Standefer Co., 215 W. 5th, L.A. 90013 † 628-6898

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Respondent.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENT IN OPPOSITION

While petitioners feel that the points and arguments advanced by counsel for respondent have been fully refuted in their petition, they do wish to reply to some of the points raised and to stress the following facts.

I

The First Point Raised By Respondent Was That The Court's Ruling In *Garrity v. New Jersey*, 385 U.S. 493, Should Not Be Applied Retroactively.

Respondent stated that the California Supreme Court had not yet ruled whether *Garrity* is to be given retroactive application or prospective application only. However, even though this Court did not apply retroactively the rules enunciated by it in *Escobedo v. Illinois*, 378 U.S. 478, the California Supreme Court, in *People v. Dorado*, 62 Cal.2d 338, applied such rules retroactively to all cases pending either in the lower courts or on appeal. In short, until the cases were finally determined, the rules were applied. By analogy, it may be assumed that the *Garrity* decision would be similarly applied.

In *Malloy v. Hogan*, 378 U.S. 1 (decided June 15, 1964), this Court stated:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement —the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will, and suffer no penalty*, as held in *Twining*, for such silence." (Emphasis added.) (Citing *Mapp v. Ohio*, 367 U.S. 643.)

In the instant case, petitioner Peter Stafford was compelled, under threat of the loss of his job and his pension after seventeen years of service as a police officer, to testify before the Grand Jury and refrain from asserting his Fifth Amendment rights. While this testimony was given shortly

before the decision in *Malloy*, Stafford's trial and the use of such testimony therein to his prejudice took place long after the date of the *Malloy* decision. Clearly, *Malloy* was applicable to his case.

In *Garrity* this Court clarified the right against self-incrimination by announcing that it also belonged to police officers as well as to private individuals, and that compulsion could arise by reason of the imposition on the defendant of a choice "between self-incrimination or job forfeiture."

Respondent cites a number of cases where this Court denied retroactive application of certain cases; but these are clearly distinguishable in that in them there had been a finalization of the particular cases. In *Johnson v. New Jersey*, 384 U.S. 719, the judgments became final and no petition for certiorari had been filed in the United States Supreme Court. After the case had been finalized, there followed a battery of collateral attacks in state and federal courts, and the case finally reached this Court via a collateral attack.

In *Linkletter v. Walker*, 381 U.S. 618, this Court refused to apply *Mapp v. Ohio*, *supra*, to cases *finalized* before *Mapp*. In other words, this Court refused to apply retroactively the *Mapp* rule in connection with collateral attacks on convictions which had previously become final.

In *Tehan v. Shott*, 382 U.S. 406, petitioner's conviction had become *finalized* by the denial of certiorari after appeal. In the previous petition for certiorari, the issue as to the Ohio rule permitting the prosecutor to comment on the failure of the defendant to testify was not attacked. This Court stated in support of its decision not to apply *Mapp* retroactively (page 408): "All avenues of direct review of respondent's conviction were thus fully foreclosed more than a year before

our decision in *Malloy v. Hogan, supra,* and almost two years before our decision in *Griffin v. California, supra.*" The case went up by way of a collateral attack through habeas corpus after the judgment of conviction had been finalized, as the Court pointed out above.

In the case of *DeStaffano v. Woods,* 392 U.S. 631, involving jury trials in criminal contempt proceedings, this Court held that rights to jury trials in state cases cannot apply to cases not *commenced* to be tried prior to the decisions.

Thus, the non-retroactivity rule has been applied to cases where they have become final and the attacks on the convictions were collateral. The present case is clearly distinguishable since we are coming to this Court on "direct review" and not by way of collateral attack, and, hence, the rules announced in *Garrity* should be applied.

In some cases this Court has applied its decisions retroactively, such as *Gideon v. Wainwright,* 372 U.S. 335, and *Jackson v. Denno,* 378 U.S. 368. The Court stated in *Johnson* that it held in *Linkletter* and *Shott* that "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such application."

On the other hand, this Court has given, in effect, a retroactive application to cases on direct review in situations almost identical with the instant case. In the very recent case of *Gardner v. Broderick,* 392 U.S. 273, in August 1965, almost a year and a half before *Garrity,* petitioner, a police officer, was subpoenaed to appear before a grand jury which was investigating bribery and corruption. In its decision in this matter, the Court stated (page 274):

> "He was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination, but was asked to sign a 'waiver of immunity' after being told he would be fired if he did not sign. Following his refusal, he was given an administrative hearing and was discharged solely for this refusal pursuant to section 1123 of the New York City Charter. . . .
>
> "Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need to implement its guaranty. (Citing cases, including *Spevack v. Klein*, 385 U.S. 511.) The privilege is applicable to state as well as federal proceedings."

The Court, after commenting on the fact that the discharge of petitioner occurred a year and a half before *Garrity*, stated (page 276):

> "In that case we held that when a policeman had been compelled to testify by the threat that otherwise he would be removed from office, *the testimony he gave could not be used against him in a subsequent prosecution* . . ." (Emphasis added.)

On page 279 the Court stated:

> "In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness to coerce a waiver of immunity it confers *on penalty of loss of employment*."

Thus, even though the refusal in *Gardner* to waive the

Fifth Amendment took place a year and a half before *Garrity*, the rule of *Garrity* was applied. It is to be noted that *Gardner* went up to this Court on direct review, as does the instant case.

A similar holding of this Court, on direct review, occurred in *Uniformed Sanitation Men Association v. Commission of Sanitation of New York*, 392 U.S. 280. Petitioners were dismissed for invoking the privilege against self-incrimination. This Court, in upholding their rights to do so and ruling that their discharge for so doing was illegal, applied *Garrity* retroactively. The Court commented (page 283):

> "They [petitioners] were dismissed for invoking and refusing to waive their constitutional right against self-incrimination . . . *Garrity v. New Jersey*, 385 U.S. 493 (1967), in which we held that testimony compelled by threat of dismissal could not be used in a criminal prosecution of the witness, had not been decided when these twelve petitioners were put to their hazardous choice."

In *Katz v. United States*, 389 U.S. 347, a similar position was taken by the government to the state in the instant case. Because government agents relied on previous decisions of this Court in using an electronic surveillance device, the government took the position that the decision of this Court should not be applied retroactively. But this Court rejected such view and stated (page 356):

> "The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial

sanction, we should retroactively validate their conduct. That we cannot do."

In the instant case, the state asks this Court to validate retroactively the conduct of the officers in compelling petitioner Stafford to testify before the Grand Jury and to waive his privilege against self-incrimination under penalty of being fired and of losing thereby his pension. Under the *Garrity* case, this type of coercion was held to be violative of the Fifth Amendment. Under the rules of the above cases, *Malloy* and *Garrity* should definitely be applied to the instant case and the contentions of the respondent rejected.

The Treatment Accorded Stafford.

Ancillary to the above is the fact that Stafford was picked up at the schoolyard before 9:00 a.m. and taken out of the city to a motel where he was forced to strip and submit to a degrading physical examination. Then later Stafford was taken to police headquarters and not released until midnight, at which time he was instructed by his superior officers to remain at home (house arrest) for some days. All of which is part of the compulsion applied to Stafford. (R.T. p. 2299) Stafford was told by his superiors, Captain Mills and Lt. Sporrer (R.T. 2456), that he could not refuse to testify. Lt. Sporrer said, "You know you can't refuse to testify. If you do it means dismissal." Stafford was subpoenaed by Captain Mills (R.T. 949-950-2299.)

Stafford testified that during his appearance before the Grand Jury, "[he] knew that if [he] refused to testify [he] would be fired." (R.T. 2314.)

The Testimony Before The Grand Jury Was Given By Stafford Under Compulsion, And The Use Thereof At His Trial Was Highly Prejudicial.

The respondent contends that Stafford was not prejudiced by the use of the Grand Jury testimony. In the interest of brevity, we respectfully refer the Court to pages 24 through 27 of our Petition for Certiorari.

Even the jury foreman asked to have Stafford's Grand Jury testimony read (R.T. 3269-3276) following the reading of some of Stafford's testimony before the Grand Jury in the prosecutor's final argument to the trial jury (R.T. 3248-3249).

The Telephone Interceptions.

Respondent brushes aside these telephone interceptions as all being under the control of the police and in use over their intercommunication system.

Even a policeman has the right to believe he is talking in privacy while investigating a case or otherwise.

For instance, the monitoring of Stafford's call (Exs. 57-59; R.T. 1151) to the Motor Vehicle Department in another building some five miles distant, without permission of either Stafford or the State Motor Vehicle Department employee, certainly was illegal and illustrates how far the prosecution went in this case.

The Lipowitz Incident.

This was highly prejudicial, and the trial court could have made more certain that no prejudice resulted, by interviewing the jurors and polling them on this issue. This the court refused to do. This evidence did not show

that Stafford was connected with the conspiracy. It was an entirely unrelated incident – elicited from Officer Gunn, the provocateur. (R.T. 907-908; 1010-1011; 2104) See *Sheppard v. Maxwell*, 384 U.S. 333.

CONCLUSION

As stated, we have not attempted to answer every point or argument advanced by respondent; we urge that such arguments have been answered in our Petition for Certiorari.

Respectfully submitted,

RUSSELL E. PARSONS and
HARRY E. WEISS
For Petitioner Canard

RUSSELL E. PARSONS
For Petitioners Stafford, Myers and Miller
ARTHUR LEWIS, *Of Counsel.*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on OCTOBER , 1968, I served the within REPLY OF PETITIONERS TO BRIEF OF RESPONDENT IN OPPOSITION (Canard v. California - No. 80) on the following named parties, by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

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ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012

DISTRICT ATTORNEY, COUNTY OF LOS ANGELES
600 HALL OF JUSTICE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER , 1968, at LOS ANGELES, CALIFORNIA.

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